92-1727

No.

Supreme Court, U.S.
FILED
APR 28 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

MADERA IRRIGATION DISTRICT
Petitioner

vs.

LAWRENCE F. HANCOCK, et al.
Respondents

PETITION FOR A WRIT OF CERTIORARI
To The United States Court Of Appeals For The Ninth Circuit

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8 pp

I.
THE QUESTIONS PRESENTED FOR REVIEW:

In 1939 Petitioner, pursuant to a contract with the United States, conveyed its Friant Dam site and its rights to divert water from the San Joaquin River to the United States to be used in the construction of the Central Valley Project in return for a promise by the United States to deliver to Petitioner a permanent supply of water from the Project pursuant to successive Water Service Contracts at a price no higher than that charged to other Friant contractors:

1. Did an Act of Congress adopted in 1986 requiring Petitioner to pay an additional $5,200,000.00 for water delivered under the first 40 year Water Service Contract over and above the contractual maximum rate set forth therein, as a condition precedent to the exercise by Petitioner of its contractual right of continued renewals of Water Service Contracts, deprive Petitioner of vested rights under the 5th Amendment of the Constitution?

2. Did the Congressional Act requiring Petitioner to pay $5,200,000.00 more than other C.V.P. Friant Contracts for water to be delivered under a renewed Water Service Contract deprive Petitioner of vested rights under the 5th Amendment of the Constitution when Petitioner's contract with the United States provided that on renewal Petitioner would not be required to pay more for water than other Friant Contractors?

3. Did a reservation by the Secretary of Interior of a unilateral right to modify the terms of a renewal contract violate Petitioner's contractual right of renewal under the 5th Amendment of the Constitution?

II.

THE PARTIES TO THE PROCEEDING

MADERA IRRIGATION DISTRICT, Plaintiff, Appellant and Petitioner

LAWRENCE F. HANCOCK, as Regional Director of the Mid-Pacific Region of the United States Bureau of Reclamation; DENNIS UNDERWOOD, as Commissioner of Reclamation, United States Department of the Interior; and MANUEL LUJAN, JR., as Secretary of the Interior of the United States of America, Defendants- Respondents;

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFOR- NIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTS FISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIAT- ION; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDOBON SOCIETY, INC. UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION and NATIONAL AUDOBON SOCIETY, Intervenors-Respondents.

III.

TABLE OF CONTENTS

Page:

I. THE QUESTIONS PRESENTED FOR REVIEW:..... 1.

II. THE PARTIES TO THE PROCEEDING ..... 2.

III. TABLE OF CONTENTS ..... 3.

IV. TABLE OF AUTHORITIES..... 6.

V. THE OFFICIAL AND UNOFFICIAL REPORTS OR OPINIONS DELIVERED BY OTHER COURTS ..... 7.

VI. GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED..... 7.

VII. THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE ..... 8.

VIII. STATEMENT OF THE CASE..... 8.

A. THE FACTUAL BACKGROUND ..... 8.

1. The District: ..... 8.
2. The 1939 Contract ..... 9.
3. The 1951 Water Service Contract: ..... 10.
4. Renewal Negotiations..... 11.
5. The Present Action:..... 12.

B. BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE. ..... 13.

IX. ARGUMENT ..... 13.

A. INTRODUCTION: ..... 13.

1. The Constitutional Issue: ..... 13.

B. MADERA HAS A VESTED RIGHT OF RENEWAL OF ITS WATER SERVICE CONTRACT WHICH IS ENTITLED TO CONSTITUTIONAL PROTECTION UNDER THE FIFTH AMENDMENT. ..... 15.

1. The Contract Terms: ..... 15.
2. The Circuit Court's Determination: ..... 16.

C. MADERA HAS A VESTED RIGHT FROM ITS 1939 CONTRACT TO PAY NO MORE FOR WATER THAN THE FRIANT CONTRACTORS WHICH IS ENTITLED TO CONSTITUTIONAL PROTECTION UNDER THE FIFTH AMENDMENT ..... 19.

1. The Contract Terms: ..... 19.
2. The Circuit Court's Determination: ..... 20.

D. MADERA'S VESTED RIGHT OF RENEWAL REQUIRES THE UNITED STATES TO OFFER A CONTRACT, NOT A NULLITY. ..... 22.

1. Article 14: ..... 22.
2. NEPA and ESA: ..... 22.

E. THE DECISION IS IN CONFLICT WITH ANOTHER DECISION OF THE 9TH CIRCUIT COURT OF APPEALS. ..... 23.
1. *Alpine Ridge Group v. Kemp*: ..... 23.
2. "Sovereign Power is Retained Unless Surrendered in unmistakable terms": ..... 25.

CONCLUSION ..... 27.

APPENDIX

APPENDIX A: OPINION OF THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.

APPENDIX B: ORDER OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA.

APPENDIX C: JUDGMENT OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA.

APPENDIX D: UNITED STATES CONSTITUTION, STATUTES AND CONTRACT PROVISIONS.

IV.

TABLE OF AUTHORITIES

CASES:

Page

Bowen v. Agencies Opp. To Soc. Sec. Entrapment, 477 US 41, 91 L.Ed 2d 35, 106 S. Ct. 2390 (1986) . 25.

Lynch v. United States, 292 US 571, 78 L Ed 1434, 54S Ct 840 (1934) ..... 14, 27.

United States v. Larionoff, 431 US 864, 53 L Ed 2d 48, 97 S Ct 2150 ..... 14.

Alpine Ridge Group v. Kemp, 955 F.2d 1382, (9th Cir.), cert. granted, 113 S. Ct. 490 (1992 ..... 23, 26.

Torncello v. United States, 681 F.2d 756, (Cl. Ct 1982). ..... 23.

UNITED STATES CONSTITUTION:

FIFTH AMENDMENT ..... 8.

STATUTES:

43U.S.C. § 390uu ..... 8, 15.
28 U.S.C. § 1254. ..... 8.
Section 106 of Pub. L. No. 96-546..... 13.

V.

THE OFFICIAL AND UNOFFICIAL REPORTS OR OPINIONS DELIVERED BY OTHER COURTS

1. The Amended Opinion of the United States Court of Appeals for the Ninth Circuit has not as yet been published. It is attached hereto as Appendix A.

2. The Opinion of the District Court is unpublished, and is attached hereto as Appendix B.

3. The Judgment appealed from is attached hereto as Appendix C.

VI.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. The date of entry of the amended judgment and decree of the United States Court of Appeals for the Ninth Circuit is March 8, 1993.

2. The date of the order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Bank was March 29, 1993.

3. The statutory provision believed to confer on this Court jurisdiction to review the judgment and decree in question by writ of certiorari is 28 U.S.C. § 1254.

VII.

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

1. Fifth Amendment of the Constitution of the United States.[1]

2. 43 U.S.C. § 390uu[2]

3. Section 106 of Pub. L. No. 96-546[3]

VIII.

STATEMENT OF THE CASE

A. THE FACTUAL BACKGROUND

1. The District:

Madera Irrigation District (hereinafter "Madera") was formed in 1922 to obtain a surface water supply from the San Joaquin River to supplement a depleting ground water supply. By 1939 it had adopted a plan to construct a dam at Friant and had acquired, through litigation, important rights to divert the flows of the river to supply its landowners with an adequate supply of irrigation water.

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[1] See APENDIX D: Page 1,

[2] See APENDIX D: Page 1.

[3] See APENDIX D: Page 1.

2. The 1939 Contract:

In 1935 Congress authorized construction of the Central Valley Project which included a dam at Friant. To facilitate construction of the Friant Dam and Reservoir as part of the Central Valley Project, Madera entered into a contract on May 24, 1939, under which it sold to the United States its dam site and water rights. The contract recognized Madera's plans to construct Friant Dam to provide needed water for the District. It provided in part:

> "the United States recognizes that the District, in contracting to transfer and surrender to the United States its properties and rights hereinabove referred to is relying upon the District being entitled to purchase a supplemental supply of water from Friant Dam and Reservoir . . . and the United States desires to give the District assurance that . . . the District shall be given opportunity to purchase . . . such a water supply . . . and the District desires to have it understood that it contemplates contracting hereafter for such a water supply."

The contract provided that if Friant Dam and Madera Canal to carry the water to Madera was not constructed that the dam site and water rights would be returned to Madera.

Madera was given the right to purchase 270,000 acre feet of Project water of which 120,00 acre feet would be Class 1 water (a firm supply) and the remaining amount would be Class 2 water (an undependable and variable supply from none to 150,000 acre feet).

Moreover, although the price of the water could not be determined at the time of the contract's execu-

tion, the government agreed that it would not exceed that charged other purchasers of Friant water.

Subsequent to execution of the 1939 Contract, the Chowchilla Water District was formed from land withdrawn from Madera. On August 24, 1949, with the consent of the United States, a partial assignment of the 1939 Contract was made to that district. Chowchilla entered into a water service contract in 1950.

3. The 1951 Water Service Contract:

On May 14, 1951, Madera and the United States entered into a water service contract and for construction of a distribution system. The 1951 Contract acknowledges that the parties desire to provide for the continued delivery of water, but added a provision that:

> The United States recognizes that the District in contracting to transfer and surrender its properties and rights hereinabove referred to relied upon its right to purchase a permanent supplemental supply of water from Friant Dam and Reservoir and the agreement that the United States would construct the facilities described subject to the terms and conditions set forth in the 1939 contract.

The 1951 contract fixed the price to be announced each year by the Secretary

> "but in no event shall the rates so announced be in excess of $3.50 per acre foot for Class 1 water and $1.50 per acre foot for Class 2 water."

The 1951 Contract provides for a right of renewal upon its expiration on May 14, 1992, with terms

entitling the district to the rights conferred upon it by the 1939 Contract

4. Renewal Negotiations:

As the end of the forty year term approached, Madera, Chowchilla and the Bureau began negotiation of the renewals. The United States insisted on two provisions in the contract:

> The first was the requirement that the Districts pay the difference between the $3.50 and $1.50 per acre foot set forth in, and paid under, Chowchilla's 1950 contract and Madera's 1951 contract and what the Bureau of Reclamation had computed in 1988 to be the Districts' share of the operation and maintenance costs of the Project during the 40 years covered by the 1951 contract. This amount is currently in excess of $5,200,000.00 for Madera.
>
> The second was Article 14 of the proposed contract, pursuant to which the Districts were required to agree that an EIS be prepared under the National Environmental Protection Act (NEPA) and further consultation be done under the Endangered Species Act (ESA) and gave the Secretary the unilateral right thereafter to amend the contract provisions without the consent of the Districts.

Madera and Chowchilla claimed that the two provisions in the proposed new contract violated their rights under the previous contracts:

> First that the imposition of the O&M Deficit provisions violated their constitutionally protected right under the 1950 and 1951 con-

tracts to pay no more than $3.50 and $1.50 for water delivered thereunder.

Second that the imposition of the O&M Deficit provisions violated their constitutionally protected right under the 1939 contract to pay no more than other Friant contractors for water delivered under the renewal contract.

Third that the computation of the O&M Deficit was improperly made.

Fourth that the reservation by the Secretary of the unilateral right to modify the terms of the contract rendered it a nullity and violated the Districts' constitutionally protected right to obtain a renewal contract.

5. The Present Action:

The foregoing created an impasse and Madera and Chowchilla filed an action for Declaratory Relief in the District Court. The Court allowed intervention by the Intervenors and both the United States and the Intervenors filed motions to dismiss for failure to state a claim. Their motions were granted and a judgment of dismissal entered.

Chowchilla, whose 1950 contract had expired, was required to file a dismissal as a condition imposed by the Secretary of Interior to receiving continued delivery of Project water.

Appeal was made by Madera to the 9th Circuit which affirmed the District Court. Motions for Rehearing were denied and this Petition followed.

B. BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.

1. 43 U.S.C. § 390uu[4] provides authority to commence an action against the United States involving Reclamation Contracts in the District Court.

IX.
ARGUMENT

A. INTRODUCTION:

1. The Constitutional Issue:

The O&M Deficit issue in this case brings before this Court the balance between protecting vested contract rights under the 5th Amendment and the sovereign power of Congress to enact laws.

At the outset Petitioner recognizes that in promoting the general welfare Congress can pass laws which will affect contractual rights of persons who have entered into contracts with the United States. NEPA and ESA are examples of such acts and Petitioner does not claim to be insulated from the provisions thereof.

Section 106 of Pub. L. No. 96-546[5] under which the O&M Deficit charges are mandated is not an act to promote the general welfare, its sole purpose is to raise money for the United States.

This distinction was not observed in the opinions

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[4] See APENDIX D: page 1.

[5] See Apendix D page 1.

of either the District or Circuit courts although it has long been recognized by this Court. In *Lynch v. United States*, 292 US 571, 78 L Ed 1434, 54S Ct 840 (1934) the Court stated at 292 US 579:

> "...Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy but an act of repudiation."

This Court in *United States v. Larionoff*, 431 US 864, 53 L Ed 2d 48, 97 S Ct 2150 (1977) was construing a statute affecting the pay of service men. Congress had enacted VRB which promised bonuses to service men who extended their service. In 1974 it repealed the act. The Court stated at 431 US page 879:

> "When Johnson made that commitment, by entering an agreement to extend his enlistment, he, like Larionoff, became entitled to receive at some future date a VRB at the award level then in effect... Thus, unless Congress intended, in repealing the VRB program in 1974, to divest Johnson of the rights he had already earned, *and constitutionally could do so*, the prospective repeal of the program could not affect his right to receive a VRB, even though the date on which the bonus was to be paid had not yet arrived.
>
> Of Course, if Congress had such an intent, serious constitutional questions would be presented. No one disputes that Congress may prospectively reduce the pay of members of the Armed Forces,

> even if that reduction deprived members of benefits they had expected to be able to earn. (citations) *It is quite a different matter, however for Congress to deprive a service member of pay due for services already performed, but still owing. In that case, the Congressional action would appear in a different constitutional light.* (citing *Lynch* supra and *Perry* supra) In view of these problems, we would not lightly conclude in the absence of a clear expression of congressional intent that in amending (VRB) and establishing a new bonus system, Congress intended to affect the rights of those service members who had extended their enlistments and become entitled to receive VRB's." (emphasis added)

As will be pointed out in discussing the conflict in the decision by the 9th Circuit with its decision in *Alpine Ridge Group v. Kemp*, 955 F.2d 1382, 1387 (9th Cir.), cert. granted, 113 S. Ct. 490 (1992) the court in *Alpine* did recognize the difference in applying Constitutional Fifth Amendment protection to acts of Congress to promote the general welfare and acts of Congress to raise money.

B. MADERA HAS A VESTED RIGHT OF RENEWAL OF ITS WATER SERVICE CONTRACT WHICH IS ENTITLED TO CONSTITUTIONAL PROTECTION UNDER THE FIFTH AMENDMENT.

1. The Contract Terms:

Madera transferred its dam site and water rights under a contractual promise from the United States to

a permanent supply of Project water by successive contracts. The 1951 contract provides in part:

> ". . . the District and the United States on May 24, 1939 executed a contract . . . under the terms of which the District . . . became entitled to purchase from Friant Dam and reservoir . . . a permanent supplemental supply of Class 1 and Class 2 water . . ."
>
> ". . . the United States recognizes that the District in contracting to transfer and surrender its properties and rights hereinabove referred to relied upon its right to purchase a permanent supplemental supply of water from Friant Dam and Reservoir and the agreement that the United States would construct the facilities described . . ."

The 1951 Contract amended the 1939 Contract by giving Madera the right to exercise its option to renew its successive water service contracts within six months after the expiration of each succeeding contract.

2. The Circuit Court's Determination:

The Court of Appeals in its Opinion recognized Madera's vested right to renew. After quoting from the 1951 Contract the Circuit Court stated:

> This provision guarantees Madera certain rights after the expiration of the 1951 contract. It has a vested property right to a permanent water supply based on express provisions of its contracts. *Cf: Alpine Ridge Group v. Kemp,* 955 F.2d 1382, 1385-86 (9thCir. 1992), (express provisions of contract supported by independent consideration, not merely legislative provisions, create vested

property rights), cert. granted, 113 S. Ct. 490 (1992). The question is not whether its rights exist, but whether they are being violated."[6]

The Circuit Court further recognized that Congress could not retroactively change the price Madera paid for water under the 1951 Contract, stating:

> "When parties contract for a price not to exceed a certain dollar figure, that necessarily carries the implication that the seller bears the risk that its, costs will exceed that ceiling. A government contract supported by consideration to pay a subsidy is legitimate and enforceable. *Cf. Alpine Ridge Group v. Kemp,* 955 F.2d 1382, 1383 (9th Cir. 1992), (upholding contracts obligating government to subsidize low income housing rents), cert. granted, 113 S. Ct. 490 (1992). The promise to subsidize if necessary may be an instrument of policy designed to induce people to do things they otherwise would not do, such as transfer water rights and land to the United States, settle in the West and start a farm, or invest in an existing farm and equipment. We will not construe away the unmistakable term establishing a ceiling price in the 1951 contract on the ground that it granted an unintended subsidy."[7]

The Circuit Court determined, however that Madera's rights were not violated, stating:

> "Nevertheless, we conclude that the re-

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[6] APPENDIX A: Page 10.

[7] APPENDIX A: Page 11.

coupment of the operations and maintenance expense does not violate Madera's rights under the 1951 contact. Madera got its water during the forty year term, and need pay no more for the old water than the price to which it agreed. Were it to buy no more water, it would owe no more money for the operations and maintenance expense. The recoupment will be a factor in the price of water under the renewal contract. The price of the new water will be calculated in such a way as to recoup a subsidy previously granted, as though the subsidy were a debt, but the subsidy is not owed like a debt. Madera has no obligation to repay it. The means by which the price of new water will be established looks retroactively at the costs of supplying the old water, but Madera could not be forced to pay the money in the absence of a renewal contract, so it is a charge for new water calculated on the basis of the old water, rather than an additional charge for the old water.[8]

While we disagree with the Circuit Court's determination that recoupment of the O&M surcharge is a "part of the cost of new water under the renewal contract" in view of the statutory language,[9] such determination is immaterial in deciding whether Madera's constitutionally protected right to renew is violated.

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[8] APPENDIX A: Pages 11-12

[9] Pub. L. No. 99-546 § 106:

"The Secretary of the Interior shall include in each new or amended contract for the delivery of water from the Central Valley Project provisions ensuring that any annual deficit (outstanding or hereafter arising) incurred by a Central Valley Project water contractor in the payment of operation and maintenance costs of the Central Valley Project is repaid by such contractor under the terms of such new or amended contract . . ."

In saying that Madera does not have to pay the additional $5,200,000.00 O&M Surcharge on deliveries made under the 1951 Contract if it doesn't renew its contract, the Circuit Court ignores Madera's acknowledged constitutionally protected right of renewal. If Madera is required to pay an additional $5,200,000.00 computed on water delivered and paid for on an agreed maximum price under the 1951 Contract as a condition precedent to renewal, where is the Constitutional protection of the right to renew?

In weighing Madera's rights against Congressional sovereignty to enact laws it must be remembered that the act requiring collection of the O&M Deficit is purely an act to raise additional revenue for the United States, not an act to promote the general welfare.

C. MADERA HAS A VESTED RIGHT FROM ITS 1939 CONTRACT TO PAY NO MORE FOR WATER THAN THE FRIANT CONTRACTORS WHICH IS ENTITLED TO CONSTITUTIONAL PROTECTION UNDER THE FIFTH AMENDMENT.

1. The Contract Terms:

The 1939 Contract provides in connection with the price to be paid by Madera for its permanent water supply:

> "It is mutually understood by the parties hereto that it is not possible at this time to fix a price to be paid by the District for said water, but the United States agrees that the cost of said water to the District shall not exceed charges made to others than the District for the same class of water and service from the said Friant Dam and

Reservoir. "

The 1951 Contract provides:

"Under this Part A [the water service portion of the contract] and under succeeding contracts the rates to be charged to the District for water service shall not exceed charges made to others than the District for the same class of water and service from Friant Dam and Reservoir."

Under the terms offered by the United States in the renewal contract, Madera would be required to pay $5,200,000.00 more than other Friant contractors for the same class of water and service from Friant Dam and Reservoir.

2. The Circuit Court's Determination:

The Circuit Court attempts to construe the contract as allowing the United States to charge Madera more than others for the same class of water and service stating:

"The two general principles of avoiding unconstitutionality and construing contracts to preserve sovereign authority nevertheless compel us to reject Madera's argument. 'The contractual words, "for the same . . . service" preserve Congressional authority to require a different charge for different service. Service requiring more expensive operation and maintenance is different from service requiring less expensive operation and maintenance. The equality promised applies to "rates," and the 1951 contract puts rates in section 7, and operation and maintenance cost in a separate section 15, evidently contemplating in section 16 that the irrigation dis-

trict would take over operation and maintenance. This suggests that the parties did not intend that Madera's operation and maintenance cost could not exceed that of other districts."

The Circuit Court misconstrues the facts and the 1951 Contract. Gravelly Ford Water District takes its Class 2 water supply from the same outlet on Madera Canal as Madera and uses Madera's distribution system to carry the water to its boundaries, yet Gravelly Ford is charged no O&M Deficit. How then can it be said this is a different kind of service or cost of operation from Madera's Class 2 supply which is burdened by the O&M Surcharge?

The Circuit Court misconstrues the 1951 Contract. It compares the "rates" in Section 7 with "operation and maintenance charges" in Section 15. The 1951 Contract is bifurcated into two parts. Part A is the water service portion of the contract and Part B is the contract for construction by the United States of portions of Madera's local distribution system, the cost of which is repayable over the 40 year term. The reference to operation and maintenance charges in Section 15 relate to charges made if the United States takes over operation and maintenance of the local distribution system upon default by Madera of the provisions of the agreement. It has nothing to do with rates for water service in Section 7.

Madera has no quarrel with the right of the United States to charge higher water service charges under the renewed contracts [Class 1 water has increased from $3.50 to $28.45 per acre foot and Class 2 water from $1.50 to $14.85 per acre foot] in order to pay full O&M costs and capital repayment so that the Project will pay out by 2032. It does object to pay $5,200,000.00 more than its neighboring districts for the

same class of water and the same service when it transferred its dam site and water rights to the United States on the promise that it would not be charged more than other contractors.

D. MADERA'S VESTED RIGHT OF RENEWAL REQUIRES THE UNITED STATES TO OFFER A CONTRACT, NOT A NULLITY.

1. Article 14:

Article 14. [10] of the proposed contract requires Madera to agree to the preparation of an EIS and further ESA consultation and to allow the Secretary thereafter to unilaterally modify the terms of the contract. As the Circuit Court pointed out[11] in another action in the District Court involving the same parties as the present case, the United States and Madera take the position that ESA has been complied with and an EIS is not necessary as a prerequisite to renewal.

2. NEPA and ESA:

Madera does not assert that it is not subject to NEPA and ESA, if a contract is entered into without complying with the provisions of those acts it can be set aside. What Madera objects to in Article 14 is requiring the District to agree to further action which Madera and the United States assert is unnecessary under those Acts and then to agree to unilateral modification of the contract by the Secretary. Madera's Constitutional

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[10] See APPENDIX D: Page 2.

[11] See APENDIX A: Page 19.

right of renewal is to receive a contract, not a nullity. The government cannot reserve to itself an unlimited right to escape its contractual obligations "without rendering its promises illusory and the contract void." *Torncello v. United States*, 681 F.2d 756, 760 (Cl. Ct 1982).

E. THE DECISION IS IN CONFLICT WITH ANOTHER DECISION OF THE 9TH CIRCUIT COURT OF APPEALS.

1. *Alpine Ridge Group v. Kemp*:

In *Alpine Ridge Group v. Kemp*, 955 F.2d 1382, 1387 (9th Cir.), cert. granted, 113 S. Ct. 490 (1992) builders of low cost housing had entered into contracts with HUD which set forth the method of computing future rents. The method set forth therein was one of the two methods allowed in the statute.

After the housing had been completed, HUD determined that the contractual method of calculation was improper and imposed the other method on the builders. They sued and the court ordered the contractual method to be used.

Congress then passed a law which purported to require the builders to use the noncontractual method. The builders sought protection of their contract rights under the 5th Amendment.

The Court in *Alpine Ridge* gave a careful review of the limitations imposed on Congress under the 5th Amendment to abrogate or modify contractual commitments of the United States. It stated at page 1387:

> "For the reasons stated above, we conclude, in accord with *Rainier View*, that the own-

> ers have a vested property interest in formula-based rent adjustments pursuant to their section 8 contracts.
> . . . "Thus, the remaining question is whether Congress' abrogation of the owners' rights by section 801 of the HUD Reform Act violates due process."
>
> "The fact that Congress does not recognize its obligation under the contracts as interpreted by *Rainier View* does not affect the validity of the owner's rights, or Congress' inability to alter them by retroactively amending the underlying statute."

At page 1388:

> "We hold that these cases fall within the scope of *Lynch* and *Perry*, and that through section 801 Congress has *attempted to reduce an obligation in order to save money*. . . . Therefore we hold that section 801 unconstitutionally abrogates the owners' vested property rights in violation of the fifth amendment." (Emphasis added)

In *Madera* the issue is a contractual agreement promising a permanent water supply with the right to renew and placing a limit on water charges. These rights are vested in Madera to the same extent that the rental formulas were vested in *Alpine Ridge*. The United States through Congressional action abrogates those rights by placing an additional payment of $5,200,000.00 as a condition precedent to renewal and is attempting to charge more than the limit set in the agreement, solely as a method of increasing dollar returns to the United States. If such action is unconstitutional in *Alpine Ridge* it should be unconstitutional in *Madera*.

2. "Sovereign Power is Retained Unless Surrendered in Unmistakable Terms":

The Circuit Court in its Opinion used as the criteria to measure Madera's constitutional rights whether the United States had "surrendered in unmistakable terms" Congress' power to modify government contracts.

This language comes from *Bowen v. Agencies Opp. To Soc. Sec. Entrapment,* 477 US 41, 91 L.Ed 2d 35, 106 S. Ct. 2390 (1986) in a case involving the Social Security System which the Court called "the Nation's basic social insurance program" and noted that "Congress had expressly reserved the right to alter, amend or repeal any provision of the Act."

The Court observed at page 46 of 91 L Ed 2d:

> **". . . without regard to its source, sovereign power, even when unexercised is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms. Therefore, contractual arrangements, including those to which a sovereign itself is a party, remain subject to subsequent legislation by the sovereign." (Quoting from *Merrion v. Jacarilla Apach Tribe,* 455 US 130, 148, 71 L Ed 2d 21, 102 S Ct 894 (1982))**

The Court further admonished, however:

> **"Those admonitions take on added force when the arrangement pursuant to which the Government is claimed to have surrendered a sovereign power is one that serves to implement a comprehensive social welfare program affecting**

millions of individuals throughout our nation."

The Court then quoted with approval the decisions which preserved contractual rights and stated at page 48:

> "Appellees nonetheless insist that the termination provisions embodied in the Agreement constituted a valuable property right that was 'taken' when Congress enacted amended §418(g). In the Sinking Fund Cases, the Court did observe that Congress' exercise of the reserved power 'has a limit' in that Congress could not rely on that power to 'take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made.' 99 US at 720, 25 L Ed 496, 25 L Ed 504. Similarly, other decisions have held that Congress does not have the power to repudiate its own debts, which constitute 'property' to the lender, simply in order to save money. *Perry v. United States,* 294 US at 350-351, 79 L Ed 912, 55 S Ct 432, 95 ALR 1335; See L*ynch v. United States,* 292 US at 576-577, 78 L Ed 1434, 54 S Ct 840."

The Court went on to hold that no property right existed because the Contract language exactly parroted that of the statute which reserved the right to amend.

It would appear, therefore, that the proper reading of *Bowen* is to apply the "surrender in unmistakable terms" test to Congressional action which relates to the general public good. Where, however, the legislation is for the sole purpose of raising more revenue for the United States the "surrender" test should not be applied and contractual obligations which have created vested rights allowed protection under the Fifth

Amendment.

Where the legislation is to save or obtain money the rule stated in *Lynch v. United States*, 292 US 571, 576-77, 54 A Ct 840, 78 L Ed 1434 should be applied:

> **"Congress was free to reduce gratuities deemed excessive but was without power to reduce expenditures by abrogating contractual obligations of the United States"**

CONCLUSION

This case not only presents issues of imperitive importance to Madera, it presents issues of sovereign power to abrogate contractual commitments of the United States which are in need of judicial clarification and certainty. Certiorari should be granted as was granted in *Alpine Ridge Group, supra.*

Dated: April 25, 1993

GREEN, GREEN & RIGBY

By: _____

Denslow Green
Attorneys for Petitioner
Madera Irrigation District

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MADERA IRRIGATION DISRICT,
Plaintiff-Appellant,
NATURAL RESOURCES DEFENSE COUNCIL, et al.,
Intervenor-Appellee,
and
CHOWCHILLA WATER DISTIRICT
Plaintiff
v.

No. 91-16013
D.C. No.
CV-S-91-242-LKK

LAWRENCE F. HANCOCK, as Regional Director of the Mid-Pacific Region of the United States Bureau of Reclamation; DENNIS UNDERWOOD, as Commissioner of Reclamation, United States Department of the Interior, and MANUEL LUJAN, JR. as Secretary of the Interior of the United States of America,
Defendants-Appellees.

AMENDED
OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted
June 8, 1992-San Francisco, Califomia

Filed February 2, 1993
Amended: March 8, 1993

APPENDIX A: Opinion of United States Court of Appeals for the Ninth Circuit.

Before: Arthur L Alarcon, Cynthia Holcomb Hall and Andrew J. Kleinfield Circuit Judges.

Opinion by Judge Kleinfeld; Concurrence by Judge Hall

COUNSEL

Denslow Green, Green, Green and Rigby, Madera, California for plaintiff-appellant Madera Irrigation District.

Robert L. Klarquist, United States Department of Justice Washington, D.C., for defendants-appellees Lawrence F. Hancock et al.

Brian E. Gray, San Francisco, California, for intervenor appellees Natural Resources Defense Council, et al.

OPINION

KLEINFELD, Circuit Judge:

Madera Irrigation District sued for a declaratory judgment and injunction, to prevent the United States from changing the terms of its water purchases when Madera renewed its contract. The district court dismissed for failure to state a claim. We conclude that the government has the power to impose the particular requirements at issue, and affirm.

I. Facts.

In 1939, Madera Irrigation District sold land and San Joaquin River water rights to the United States. As part

of the consideration, the United States promised to build the Friant Dam and the Madera Canal and enter into contracts, when the project was completed, to sell Madera a permanent supply of 270,000 acre Feet of water annually. The parties agreed that "it is not possible at this time to fix a price to be paid by the District for said water, but the United States agrees that the cost of said water to the District shall not exceed charges made to others than the District for the same class of water and service from the said Friant Dan and Reservoir." Contract for Purchase of Property and Water Rights at 13 (May 24, 1939) [hereinafter the "1939 Contract"].

In 1951, when construction was done, Madera and the government entered into a forty year contract for purchase and sale of water. They agreed upon a "permanent" supply, but a contract term of forty years. Prices were limited to no more than $3.50 per acre-foot for "class one water," a dependable supply out of the first 800,000 acre feet from the project, and $1.50 for "class two water," a residue to be supplied if available but which was not expected to be as dependable. Under the 1951 contract and "under succeeding contracts the rates to be charged the District for water service shall not exceed charges made to others than the District for the same class of water and service from Friant Dam and Reservoir." Contract Between the United States and the Madera Irrigation District for Water Service and Construction of a Distribution System at 9 (May 14, 1951) [hereinafter the "1951 Contract"]. The 1951 Contract provided that "[t]he executory portions of the 1939 contract . . . shall remain in full force and effect." *Id.* at 8.

As the end of the forty year term approached, the parties began negotiation of the renewals. The irrigation district claims that two provisions in the proposed new contract violate its rights under the previous contracts. First, the government insists upon an addition to the rate in the renewal contract of an amount which would recoup the excess of operation and maintenance costs under the 1951 contract over the rates charged during that forty year term.. Second, the government insists upon a term in the renewal contract which might require an environmental impact statement and Endangered Species Act consultation, with possible subsequent modifications to the contract.

The dates illuminate the issues. When Madera transferred its land and its water rights to the federal Government, federal policy favored reclaiming desert land for agriculture by subsidizing irrigation water, to settle the West and create a class of independent family farmers. *See Peterson v. U.S. Dept. Interior*, 899 F.2d 799, 802-807 (9th Cir.), cert. denied, 111 S. Ct. 567 (1990); Barcellos and Wolfson, Inc. v. Westlands Water Dist., 899 F.2d 815 (9th Cir.), cert. denied, 111 S. Ct. 555(1990); *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1119 (9th Cir. 1976), cert. denied, 429 U.S. 1121 (1977). As the Great Depression lingered in the late 1930's, Congress and the President may have been more concerned with expanding economic opportunity than avoiding subsidy. Nothing like the National Environmental Policy Act or Endangered Species Act were in the law in 1902 when the Reclamation Act became the law, or 1939 when Madera traded its land and water rights for government promises.

Congress can change federal policy, but it cannot write on a blank slate. The old policies deposit a moraine of

contracts, conveyances, expectations and investments. Lives, families, businesses, and towns are built on the basis of the old policies. When Congress changes course, its flexibility is limited by those interests created under the old policies which enjoy legal protection. Fairness toward those who relied on continuation of past policies cuts toward protection. Flexibility, so that government can adapt to changing conditions and changing majority preferences, cuts against. Expectations reasonably based upon constitutionally protected property rights are protected against policy changes by the Fifth Amendment. Those based only on economic and political predictions, not property rights, are not protected. Our task is to determine whether the renewal provisions insisted upon by the government violated Madera's Fifth Amendment property rights.

We review de novo dismissal of an action for failure to state a claim, treating the averments of the complaint as though they were established to test whether, if true, the claim would entitle the plaintiff to relief. *Albert Bld. Corp. v. United States*, 951 F.2nd 191, 195 n.8 (9th Cir. 1991).

II. Operation and Maintenance Costs

The irrigation districts claim that the change in the price term, to recover maintenance and operation costs which were not charged in the 1951-1991 period, is improperly retroactive. The government insists upon a provision in the renewal contract which would recover with interest the subsidy in operations and maintenance costs accumulated during the old forty year contract. In so doing, the executive branch is carrying out a policy enunciated by Congress. Congress passed a statute re-

quiring the recoupment for Central Valley Project irrigation districts such as Madera.

> The Secretary of the Interior shall include in each new or amended contract for the delivery of water from the Central Valley project provisions ensuring that any annual deficit (outstanding or hereafter arising) incurred by a Central Valley project water contractor in the payment of operation and maintenance costs of the Central Valley project is repaid by such contractor under the terms of such new or amended contract, together with interest on any such deficit which arises on or after October 1, 1985 . . . .

Water Resource and Small Reclamation Projects Act, Pub. L. No. 99-546, §106, 100 Stat. 3050, 3052 (1986).

Madera was entitled to buy water for a maximum of 3.50 and $1.50 per acre-foot under its 1951 contract. The government conditions renewal on payment during. the renewal contract of millions of dollars for operation and maintenance costs incurred during the 1951 contract term. The effect, as Madera sees it, is that it will be paying more than the $3.50 and $1.50 price ceilings for its water purchased under the 1951 contract.

Madera argues that the charges cannot be imposed, for two reasons. First, it had and has a contractual right to pay no more than $3.50 and $1.50 per acre-foot for water under the 1951 contract, and the charges retroactively require it to pay more. Second, it has a contractual right to pay no more for water than other districts, and the charges would cause its price to be higher than that charged to other districts. Madera does not dispute that Congress has adopted a policy which requires recovery of operations and maintenance costs with inter-

est, and does not urge any construction of the Central Valley Project statute which would exclude Madera's renewal contract from its operation.

We accept Madera's general proposition that a valid contract right of an irrigation district against the United States is property protected by the Fifth Amendment. *Lynch v. United States*, 292 U.S. 571, 579 (1934); See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984). Rights against the United States arising out of a contract are property rights protected from deprivation or impairment by the Fifth Amendment. *Barcellos and Wolfson, Inc. v. Westlands Water District*, 899 F.2d 814, 821 (9th Cir. 1990). The Due Process Clause limits the exercise of sovereign power which would impair obligations under government contracts. *Alpine Ridge Group v. Kemp*, 955 F.2d 1382, 1387 (9th Cir.), cert. granted, 113 S. Ct. 490 (1992). To demonstrate a wrongful taking or impairment, Madera must establish that it has cognizable property rights arising out of its contracts with the government, and that the government has abrogated its contractual rights. *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Corp.* 470 U.S. 451, 472 (1985); *Barcellos and Wolfson*, 899 F.2d at 821.

Two general principles constrain our interpretation. First, we must "construe legislation in a constitutional manner 'if fairly possible.'" *Knapp v. Cardwell*, 667 F.2d 1253, 1260 (9th Cir.) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)), cert. denied, 459 U.S. 1055 (1982). Second, we must construe a contract with the government to avoid, if possible, foreclosing. the exercise of sovereign authority. Sovereign power " 'will remain intact unless surrendered in unmistakable terms.' " *Bowen v. Public Agencies Opposed to Social*

Security Enactment, 477 U.S. 41, 52 (1986) (quoting *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 148 (1982)); *Peterson v. U.S. Department of Interior,* 899 F.2d 799, 807 (9th Cir.) cert. denied, 111 S. Ct. 567 (1990). These two principles compel a construction somewhat more liberal toward the government than might be appropriate were the contract a purely private transaction. They enable it to change, not just execute past policies. But too liberal an interpretation of the residual sovereign power of the government to override its contractual commitments would eviscerate the government's power to bind itself to contract.. In addition to the moral offensiveness of allowing, the government to break its promises, too liberal a construction would have the paradoxical consequence of weakening the sovereign power to implement policy. See *Perry v. United States,* 294 U.S. 330, 351-54 (1935). If the government's commitments need not be honored, then it can induce responses to policies only by cash or coercion.

A. Right to Renewal.

The government offers a broad justification for the operation and maintenance charges and all the other changes at issue which we cannot accept. It urges that Madera had no renewal right under the 1951 contract, so the government was free to offer renewal on any terms. We cannot reconcile that with the terms of the 1939 and 195 1 contracts. Madera did not exchange its land and its water rights for a forty year supply of water. It exchanged them, as its 1951 contract recites, for a "permanent" supply of water. Section 4 of the 1951 contract expressly provided for renewal at the expiration of the forty year term and terms for the "succeed;ng contracts":

> **The executory portions of the 1939 contract . . . remain and shall remain in full force and effect, and the parties, upon the expiration of the term of Part A hereof, shall be entitled to all of the rights conferred upon them by article 14 of the 1939 contract and shall be subject to all of the terms and conditions of said article except as the aforesaid 1939 contract may be abrogated or amended by specific reference thereto and mutual agreement of the parties: . . . Under this Part A and under succeeding contracts the rates to be charged the District for water service shall not exceed charges made to others than the District for the same class of water and service from Friant Dam and Reservoir.**

1951 Contract at 8-9. Section 14 of the 1939 contract provided, inter alia, for future purchases of water:

> **(e) Whenever the United States shall be prepared to furnish service for irrigation or other purposes from Friant Reservoir .. ., the United States shall notify the District in writing relative to the availability and character of such service, and shall define the classes and quantities of service then and thereafter to be made available and the respective prices and methods of payment therefor. The District shall have six (6) months from the date of receipt of said notice within which to contract for the purchase of water on the basis of the classes and quantities of service so offered to the District; *provided*, that, having due regard for the District's procedure required or expedient in negotiating. for and securing approval of such contract, the Secretary may grant such extensions of time as he deems desirable. It is mutually understood between the parties hereto that it is not**

possible at this time to fix a price to be paid by the District for said water, but the United States agrees that the cost of said water to the District shall not exceed charges made to others than the District for the same class of water and service from the said Friant Dam and Reservoir.

1939 Contract at 13. Section 4 of the 1951 contract amended the 1939 contract, and as amended, it expressly provides for renewals after the forty year term:

> The District shall have six (6) months [after the termination of Part A [of the 1951 contract] and within six (6) months after the termination of each term provided for in succeeding contracts] within which to contract for the purchase of water on the basis of the classes and quantities of service so offered to the District; *provided*, that, having due regard for the District's procedure required or expedient in negotiating for and securing approval of such contract, the Secretary may grant such extensions of time as he deems desirable.

1939 Conlract at 13; 1951 Contract at 8-9. This provision guarantees Madera certain rights after the expiration of the 1951 contract. It has a vested propety right to a permanent water supply based on express provisions of its contracts. *Cf: Alpine Ridge Group v. Kemp*, 955 F.2d 1382, 1385-86 (9thCir. 1992), (express provisions of contract supported by independent consideration, not merely legislative provisions, create vested property rights), cert. granted, 113 S. Ct. 490 (1992). The question is not whether its rights exist, but whether they are being violated.

APPENDIX A: Opinion of United States Court of Appeals for the Ninth Circuit.

B. Retroactivity.

The government and amici argue that Madera's contract and the Reclamation Act always contemplated that Madera would pay the cost of the water, and the subsidy was accidental. so the purpose of the contract is served by the recoupment of the operating and maintenance deficits. We cannot reconcile this argument with the ceiling price in the 1951 contract. When parties contract for a price not to exceed a certain dollar figure, that necessarily carries the implication that the seller bears the risk that its, costs will exceed that ceiling. A government contract supported by consideration to pay a subsidy is legitimate and enforceable. *Cf. Alpine Ridge Group v. Kemp,* 955 F.2d 1382, 1383 (9th Cir. 1992), (upholding contracts obligating government to subsidize low income housing rents), cert. granted, 113 S. Ct. 490 (1992). The promise to subsidize if necessary may be an instrument of policy designed to induce people to do things they otherwise would not do, such as transfer water rights and land to the United States, settle in the West and start a farm, or invest in an existing farm and equipment. We will not construe away the unmistakable term establishing a ceiling price in the 1951 contract on the ground that it granted an unintended subsidy.

[11 Nevertheless, we conclude that the recoupment of the operations and maintenance expense does not violate Madera's rights under the 1951 contact. Madera got its water during: the forty year term, and need pay no more for the old water than the price to which it agreed. Were it to buy no more water, it would owe no more money for the operations and maintenance expense. The recoupment will be a factor in the price of water under the renewal contract. The price of the new water will be calculated in such a way as to recoup a

subsidy previously granted, as though the subsidy were a debt, but the subsidy is not owed like a debt. Madera has no obligation to repay it. The means by which the price of new water will be established looks retroactively at the costs of supplying the old water, but Madera could not be forced to pay the money in the absence of a renewal contract, so it is a charge for new water calculated on the basis of the old water, rather than an additional charge for the old water.

The difference between a retroactive means of calculating the price of new water, and a retroactive charge for the old water, becomes clearer when one thinks about the people to whom Madera will pass on the charges. Most of the farmers who used the more heavily subsidized water during the first two decades of the 1951 contract have probably sold out and retired by now, and some of them have probably died. They are not going to get billed for their share of the operations and maintenance costs deficit. Instead, many of the people to whom they sold their farms will pay more than they expected in the future for water. In practical effect, the recoupment of the operations and maintenance charge is entirely a burden on future rather than past purchasers of water, and largely on those who expected the subsidy rather than those who received it. The people who got the subsidy can keep the profits they earned from their crops based on the cheaper water, and they can also probably keep, unless their contracts provide otherwise, the money they received from the buyers of their farms attributable to the expected water subsidy. The burden of what the statute calls recovery of a deficit will fall largely on people other than the beneficiaries. The practical effect is a sharp policy shift, arguably disruptive of well founded expectations, but it is not retroactive.

APPENDIX A: Opinion of United States Court of Appeals for the Ninth Circuit.

Since the Central Valley Project is: a product of policy rather than the market, there is: no market measure of the value of the water. Price was a matter of policy, when it was a subsidy to settle the West by turning the deserts green and creating a class of family farmers to populate them, when it was an element in the attempt to revive the economy during the Great Depression, and now, when the subsidy may be eliminated or may flow in the opposite direction, as a tax upon users of the water. For all we know, some supporters of the changes may have felt that farms should turn back into desert, and the West should be depopulated, and saw a policy of raising the price of water beyond cost by an increment representing seller's remorse for the old subsidy as an instrument to achieve this objective. We lack the authority of the political branches to make these sorts of policy choices. Reasonable expectations arising out of past policy but without a basis in cognizable property rights may be honored by prudent politicians, because to do otherwise might be unfair, or because volatility in government policy will reduce its effectiveness in inducing long term changes in behavior. But violation of such expectations cannot give rise to a Fifth Amendment claim. *Peterson v. U.S. Dp't. of Interior*, 899 F.2d 799, 812-13 (9thCir.), cert. denied, 111 S. Ct. 567 (1990). Although Congress cannot take back a subsidy for which it has bound itself by contract, it may nevertheless quit subsidizing, and even tax the previously subsidized activity, once its contractual obligation to subsidize ends. The additional charge for new water is no more than that.

C. Higher rates than others.

Madera also pleads that as a result of the government's calculation of the operation and maintenance

deficit, it will be required to pay more for water than other Friant Dam districts. The practical effect of a higher maintenance and operations charge against Madera will be that an acre-foot of new water will cost more in the Madera Irrigation District than in some other Central Valley Project districts.

[2] We find this the most troubling issue in the case. It is distinct from the retroactivity question. Under the 1939 and 1951 contracts, Madera is entitled to rate equality with other districts on renewal:

> Under this Part A and under succeeding contracts the rates to be charged the District for water service shall not exceed charges made to others than the District for the same class of water and service from Friant Dam and Reservoir.

1951 Contract at 9; see 1939 Contract at 13. Our analysis of the retroactivity issue compels the inference that the recoupment must be treated as part of the price for new water, not part of the price for old water. Madera purchasers will pay more per acre-foot for new water under the renewal contract than purchasers in other districts, assuming. that Madera's operation and maintenance cost recoupment is higher.

The two general principles of avoiding unconstitutionality and construing contracts to preserve sovereign authority nevertheless compel us to reject Madera's argument. 'The contractual words, "for the same . . . service" preserve Congressional authority to require a different charge for different service. Service requiring more expensive operation and maintenance is different from service requiring less expensive operation and maintenance. The equality promised applies to "rates,"

and the 1951 contract puts rates in section 7, and operation and maintenance cost in a separate section 15, evidently contemplating in section 16 that the irrigation district would take over operation and maintenance. This suggests that the parties did not intend that Madera's operation and maintenanoe cost could not exceed that of other districts.

Congress decided in the plainest terms to change its policy, so that instead of buying subsidized water, purchasers of the new water will have to pay its full operation and maintenance costs, plus an increment measured by the subsidy furnished to purchasers of the old water. We are unable to say that by the words, "shall not exceed charges made to others than the District for the same class of water and service," the government's sovereign authority to charge more for water service with a higher operation and maintenance cost was "surrendered in unmistakable terms." *Peterson v. United States Dep't. of Interior, 899* F.2d 799, 807 (9th Cir. 1990), cert. denied, 111 S. Ct. 567 (1990).

D. Credits Since 1956.

Madera also argues that the Secretary errs in accounting for the operations and maintenance costs during the 1951 contract term. A 1956 statute requires that the Secretary credit the district for amounts paid in excess of operation and maintenance costs properly chargeable to that irrigation district. See 43 U.S.C. § 485h-1(3) (1983). Madera pleads that the Secretary failed to give it the credits from 1956 to 1988, and then adopted new cost allocation criteria in 1988 which increased the charges to Madera to a rate higher than other districts. The district court correctly pointed out that Madera did not plead entitlement to a credit. Rather, Madera

averred these facts in the context of its claim that the operation and maintenance charges were being imposed retroactively and in a manner which generated higher water rates for Madera than other districts. In the context in which it was pleaded, the claim is subsumed by our determination that the recoupment is not an invalid retroactive charge or rate higher than that of other districts. We therefore have no occasion to determine whether the government correctly computed Madera's share of operating costs and its credits, and the question whether it has is not decided in this lawsuit.

III. The Environmental Requirements.

The United States has also required a term in Article 14 of the new contract that provides:

> (c)(l) The Secretary has undertaken the San Joaquin Basin Resource Management Initiative, as described in the Federal Register notice of December 29, 1989, 54 Fed. Reg. 53763. (2) The United States and the Con tractor [Madera] agree that the Secretary will also complete a programmatic Environmental Impact Statement (EIS) in accordance with the National Environmental Policy Act (NEPA) and a consultn-tion in accordance with Section 7 of the Endangered Species Act (ESA) studying the environmental impacts associated with the execution and renewal of this and other water service contracts in the Friant Unit of the Central Valley Project and with the continued diversion and delivery of water thereunder. The United States and the Contractor further agree that the provisions of this contract are subject to modification by the United States, after public meetings and discussions with the Contractor, in accordance with the results of the final EIS and ESA

consultation referenced in the immediately preceding sentence and ESA and NEPA: *Provided*, that the Contractor reserves and does not waive any right it may have to challenge the legality and validity of any such modifications made to this contract pursuant to this subarticle 14(c). Notwithstanding any other provision of this contract (including the preceding sentences of this subarticle), the provisions of this contract covering the right to long-term renewal and quantity of water are non-discretionary and not subject to change except as required by applicable law.

[3] Madera argues that the language, "that the provisions of this contract are subject to modification by the United States, after public meetings and discussions with the Contractor," makes the contract offered to them a nullity, and so deprives Madera of its right to a renewal contract. We agree with Madera's legal proposition, that the government cannot reserve to itself an unlimited right to escape its contractual obligations "without rendering its promises illusory and the contract void." *Torncello v. United States*, 681 F.2d 756, 760 (Cl. Ct 1982). Here, though, the reserved power to modify is limited. The modification power is qualified by the words, "in accordance with the results of the final EIS and ESA consultation referenced in the immediately preceding sentence and ESA and NEPA: *Provided*, That the Contractor reserves and does not waive any right it may have to challenge the legality and validity of any such modifications made to this contract pursuant to this subarticle 14(c)." The government, like any contracting party, can enter into a binding agreement subject to a qualified right of modification or other avoidance of obligations. *Cf: Modern Sys. Tech. Corp. v. United States*, 24 Cl. Ct 699, 701 & n.3 (Cl. Ct.

1992), (upholding government's exercise of "termination for convenience" clause which permits government to terminate a contract at will), aff 980 F.2d 745((Fed Cir. 1992).

Both of the laws pursuant to which the government reserves rights under the proposed language are new. The National Environmental Policy Act and the Endangered Species Act were promulgated after the 1951 contract was executed, and represent policies subsequently adopted. Madera claims that its renewal rights cannot be burdened with these new policies. That proposition goes too far. The constitutionally permissible burden will depend on what the general policies may turn out to mean in application.

Madera argues that section 203(d) of the Reclamation Reform Act of 1982 prevents the imposition of these environmental regulations. See 43 U.S.C. 9 390cc(d) (1988). This section provides that -

> Amendments to contracts which are not required by the provisions of this subchapter shall not be made without the consent of the non-Federal party.

Id. Madera cannot take advantage of this provision, because the government seeks a term in a new contract, not an amendment to an existing contract. The renewal contract provision in the 1951 contract does not say that all the terms in a renewal contract must be identical to the expired contract. Whether the environmental terms added into the renewal threaten the proprietary rights preserved in Madera's contract, a permanent right to a certain amount of water at rates no higher than those charged to other purchasers of the same class of water and service from Friant Dam and Reservoir, depends on

how the environmental provisions are implemented. The government has not " 'surrendered in unmistakable terms' " its power to impose any environmental laws on the contractual relationship, so the required clause is not necessarily violative of Madera's contractual rights. *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)).

We need not and do not reach the question of what environmental requirements are permissible. As the Department of the Interior has construed it, the new paragraph 14 would not require the environmental impact statement and endangered species consultation prior to signing the renewal contract. The government proposes to renew the contract with the new provision explicitly reserving its authority to impose the requirements of the two environmental acts, subject to Madera's reservation of rights. This evidently is a construction of the "accordance with" language, inferring from these words that to the extent such review is not required by the statutes it is not required by the contract. Currently the parties are in litigation in another case, because the Secretary proposes to renew prior to any such environmental review, and the environmental advocacy groups which are intervenors and appelees before us claim in that case that the environmental review must precede renewal. In light of the government's application of the clause, the question of applicability of the two environmental laws to Madera's renewal contract is not yet a ripe controversy, in the Article III sense, so we lack jurisdiction. *Broughron Lumber Co. v. Columbia River Gorge Com'n* 975 F.2d 616, 621 (9th Cir. 1992).

AFFIRMED.

APPENDIX A: Opinion of United States Court of Appeals for the Ninth Circuit.

HALL, Circuit Judge, Concurring:

I concur in parts I and III of the majority's opinion. As to the issues: raised in part II, I concur in the result, but on the ground very ably set forth by the district court: The Appellants' right to purchase water from the government is subject to subsequent legislation affecting the exercise of that right.

Sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.' Therefore, contractual arrangements, including those to which a sovereign itself is party, 'remain subject to subsequent legislation' by the sovereign." *Bowen v Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148, 147 (1982)). "[C]ontracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority." Id. at 52-53.

Appellants' asserted property right in the rates set in the 1951 Contract ultimately rests on the argument that by virtue of the 1939 and 1951 Contracts, Congress has surrendered its right to exercise its sovereign power to legislate and the executive's obligation to act in conformance with legislation. Examination of Appellants' contracts fails to disclose the requisite unequivocal surrender of sovereignty. *See Peterson v.United States Dep't of Interior*, 899 F.2d 799, 808 (9th Cir.), cert. denied, 111 S. Ct. 567 (1990). Rather, the language of the contracts appears to reserve Congress' right to exercise its sovereign power. Both provide that they are executed

pursuant to the 1902 Federal Reclamation Act and all acts amendatory or supplementary thereto. 1939 Contract at 1; 1951 Contract at 1. The 1939 Contract explicitly recognizes that the Appellants' right to purchase water is subject to both congressional action and implementation by regulation. 1939 Contract at 12, 14.

Appellants point to language in the 1951 Contract providing that the Secretary may set the water rates annually "but in no event shall the rates so announced be in excess" of $3.50 and $1.50 per acre-foot for Class One and Class Two water, respectively. 1951 Contract at 13 (emphasis added). This language is insufficient to unmistakably surrender Congress' right to legislate. It is doubtful that the Secretary of the Interior could, by contract, waive the right of Congress to pass laws; but in any case, it does not appear that such a waiver was even contemplated. As stated above, the contracts were made pursuant to the Reclamation Act and statutes amending or supplementing the Act by their own terms. Furthermore, the initial contract recognized that the United States would unilaterally determine the price Appellants would pay for water. 1939 Contract at 12-13. Assuming for the moment that the reference to water rates in the 1951 Contract is even applicable to the imposition of operation and maintenance costs, in this context, the words "in no event" may be interpreted to men "in no event under the current legislative regime" or "in no event unless Congress legislates otherwise" would the Secretary adjust cost-sharing arrangements.

The Reclamation Act itself required that Appellants pay an appropriate share of operation and maintenance costs. See 43 U.S.C. § 485h(e) (1988). Congress amended the Act to require a cost sharing adjustment.

See Water Resource and Small Reclamation Projects Act, Pub. L. No. 99-546, § 106, 100 Stat. 3050, 3052 (1986). Appellants' argument that the rates fixed in a contract made pursuant to statute preclude the government from collecting operation and maintenance costs as clearly compelled by statute cannot prevail.

Similarly, to the extent the charges result in a total water cost to Appellants that exceeds the final cost of water to other users, the contracts allow such a result when brought about by reclamation legislation. This conclusion is further supported by other contractual provisions indicating that the parties intended the district to bear its own operation and maintenance costs for the distribution network extending from the canal. See 1951 Contract at 25-27. Thus, the district must have contemplated that its bottom-line water cost would differ in some respects from the absolute water cost of other users of Friant Dam water. The contract must be interpreted to require only that the rate per acre-foot of water is the same to each irrigation water user. Even if the contracts did not explicitly acknowledge that they were subordinate to statute, the doctrine of reserved sovereign power would compel the same conclusion. The language of the contracts does not unequivocally surrender Congressional power to charge the district for the actual cost of operating and maintaining the Madera Canal.

Accordingly, the district court's order should be affirmed.

APPENDIX A: Opinion of United States Court of Appeals for the Ninth Circuit.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MADERA IRRIGATION DISTRICT
CHOWCHILLA WATER DISTRICT,

NO. CIV. 5-91-242 LKK

Plaintiffs,

v. ORDER

LAWRENCE HANCOCK, etc., et al.,

Defendants.

NATURAL RESOURCES DEFENSE COUNCIL, et al.,

Intervenors.

This matter is before the court on defendants' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim, and on plaintiffs' motion for preliminary injunction.[1] For the reasons I now explain, plaintiffs' complaint is DISMISSED without prejudice pursuant to Fed. R. Civ. P. 12 (b) (6) for

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[1]Prior to the May 31, 1991 hearing on these motions, the court granted proposed defendants-in-intervention Natural Resources Defense Council ("NRDC",), et al., leave to file briefs as amici curiae. on May 20, 1991, the court granted the proposed intervenors' application to file an answer in intervention. Intervenors join in the United States' motion to dismiss, and oppose plaintiffs' motion for preliminary injunction.

failure to state a claim upon which relief may be granted.

In their first amended complaint for declaratory and injunctive relief ("FAC"), plaintiffs Madera Irrigation District("Madera") and Chowchilla Water District ("Chowchilla") allege that defendants Lawrence Hancock, Regional Director of the United States Bureau of Reclamation, Dennis Underwood, commissioner of Reclamation of the United States Department of the Interior, and Manuel Lujan, Secretary of the Interior, owe plaintiffs a duty, arising out of a 1939 contract between Madera and the Bureau of Reclamation, to renew contracts for water service from the Central Valley Project ("CVP") without certain language which defendants require be included. Plaintiffs assert that the defendants' insistence that this language be included in renewal contracts violates their constitutional rights guaranteed by the due process clause of the Fifth Amendment and the contract clause of Art. I, §10, as well as federal reclamation law. Plaintiffs also seek a declaration that operation and maintenance ("O&M") charges imposed on them by defendants are unauthorized by law, violate the terms of plaintiffs' water service contracts, and violate the same constitutional provisions.

I.
FACTS AND BACKGROUND

A. The 1939 Contract

To facilitate construction of the Friant Dam and Reservoir as part of the Central Valley Project, the Madera Irrigation District entered into a contract on May 24, 1939, under which it sold to the United States a dam site and certain water rights. The 1939 Contract

was explicitly executed pursuant to the Federal Reclamation Act of 1902, "and acts amendatory or supplementary thereto." Contract for Purchase of Property and Water Rights, May 24, 1939, ¶ 1 (hereinafter "1939 Contract"). The contract recognized that Madera intended to purchase supplemental water from the CVP when it was completed, and gave it the right to do so.[2] Moreover, although the price of the water could not be determined at the time of the contract's execution, the government agreed that it would not exceed that charged other purchasers.[3] Performance of the contract was made contingent upon Congress making appropriations necessary for completion of the project. 1939 Contract ¶ 17.

Subsequent to execution of the 1939 Contract, the Chowchilla Water District was formed from land withdrawn from Madera. On August 24, 1949, with the consent of the United States, a partial assignment of the 1939 Contract was made to that district.

B. The 1950 and 1951 Water Service Contracts

On July 5, 1950, the United States and Chowchilla entered into a 40-year contract providing

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2 "The District shall be entitled, as hereinafter provided, to purchase a supplemental supply of water from Friant Dam and Reservoir [in a specified annual amount] . . . . Contracts for water shall be subject to a set of regulations to be issued by the Secretary prior to the execution of any such contracts . . ." 1939 Contract ¶ 14(a) & (d).

3 "It is mutually understood between the parties hereto that it is not possible at this time to fix a price to be paid by the District for said water, but the United States agrees that the costs of said water to the District shall not exceed charges made to other than the District for the same class of water and service from the said Friant Dam and Reservoir." 1939 Contract ¶ 14(e).

water from the CVP to Chowchilla. Contract Between the United States and the Chowchilla Water District Providing for Water Service, July 5, 1950 (hereinafter "1950 Contract") . Like the 1939 Contract, the 1950 Contract explicitly provides that it is made in pursuance of the Federal Reclamation Act of 1902, "and all acts of Congress amendatory thereof or supplementary thereto, collectively herein styled the 'Federal reclamation laws.'" Id. at p.1. The 1950 Contract acknowledged the desire of Chowchilla to purchase water from the project, [4] and provides that it constituted a fulfillment of obligations under Article 14 of the 1939 contract.[5] The 1950 Contract specifies a price of $1.50 per acre-foot for Class 2 water, and $3.50 per acre-foot for Class 1 water. Id. at ¶ 6(a). The 1950 Contract expired on February 28, 1991. FAC ¶52.

On May 14, 1951, Madera and the United States entered into a water service contract with terms substantially similar to the Chowchilla agreement. Contract Between the United States and the Madera Irrigation District for Water Service and Construction of a Distribution System, May 14, 1951 (hereinafter

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[4]The District desires to contract, pursuant to the Federal reclamation laws . . . for the furnishing by the United States of an additional water supply from the Project, for which the District will make payment to the United States upon the basis, at the rates, and pursuant to the conditions hereinafter set forth. . . ." 1950 Contract at p.3.

[5] The executory portions of the 1939 contract, as modified by the assignment of August 24, 1949 . . . shall remain in full force and effect except those provisions of the aforesaid 1939 contract which may be abrogated or amended by specific reference thereto and mutual agreement of the parties: Provided, that this contract, during the term thereof, shall constitute full satisfaction of all of the District's rights under article 14 of the aforesaid 1939 contract . . . ." 1950 Contract ¶ 3.

"1951 Contract") As with the 1950 Contract, the 1951 Contract explicitly provides that it is made pursuant to the Federal reclamation laws. Id. at p.1. The 1951 Contract acknowledges that the parties desire to provide for the continued delivery of water,[6] but added a provision that

> The United States recognizes that the District in contracting to transfer and surrender its properties and rights hereinabove referred to relied upon its right to purchase a permanent supplemental supply of water from Friant Dam and Reservoir and the agreement that the United States would construct the facilities described subject to the terms and conditions set forth in the 1939 contract.

Id. at p.4. Finally, the 1951 Contract provides for a right of renewal upon its expiration on May 14, 1992, with terms entitling the district to the rights conferred upon it by the 1939 Contract[7].

On July 10, 1989, Chowchilla and the United States agreed to amend the 1951 Contract as follows:

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[6]The District desires to contract for the purchase and the United States desires to contract for the furnishing to the District of the said quantity of water that the District is now entitled to purchase under the 1939 contract subject to the terms and conditions contained in said 1939 contract and the Federal reclamation laws . . . and for which the District will make payment to the United States upon the bases, at the rates, and pursuant to the conditions hereinafter set forth. 1951 Contract at page 3.

[7] Under the 1951 Contract, it was agreed that Madera "shall be entitled to all of the rights conferred upon them by article 14 of the 1939 contract and shall be subject to all of the terms and conditions of said article except as the aforesaid 1939 contract may be abrogated or amended by specific reference thereto and mutual agreement of the parties: Provided, That this contract during [its 40 year term] shall constitute full satisfaction of all of the District's rights under article 14 of the aforesaid 1939 contract." 1951 Contract ¶ 4.

The terms and conditions of each renewal shall be agreed to upon by the earliest reasonable date prior to the expiration of the then existing contract.

FAC at 19.

C. Proposed Article 14(c) (2)

The complaint alleges that on December 20, 1990, Plaintiffs were informed by defendants that any water service renewal contract would contain language recognizing the Secretary's obligation to conform the contracts to the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA"). The proposed clause, however, reserved to the plaintiffs the right to challenge any modification of the contracts premised upon those obligations.[8]

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[8] The proposed language is as follows:

" (c) (1) The Secretary has undertaken the San Joaquin River Basin Resource Management Initiative, as described in the Federal Register notice of December 29, 1989, 54 Fed. Reg. 53763."

" (2) The United States and the Contractor agree that the Secretary will also complete a programmatic Environmental Impact Statement (EIS) in accordance with the National Environmental Policy Act (NEPA) and in accordance with Section 7 of the Endangered Species Act (ESA) studying the environmental impacts associated with the execution and renewal of this and other water service contracts in the Friant Unit of the Central Valley Project and the continued diversion and delivery of water thereunder. The United States and the Contractor further agree that the provisions of this contract are subject to modification by the United States, after public meetings and discussions with the Contractor, in accordance with the results of the final EIS and ESA consultation referenced in the immediately preceding sentence and ESA and NEPA: Provided, That the Contractor reserves and does not waive any right it may have to challenge the legality and validity of any such modifications made to this contract pursuant to this subarticle 14 (c). Notwithstanding any other provisions of this contract (including the preceding sentences of this subarticle), the provisions of this contract covering the right to long-term renewal and quantity of

Plaintiffs allege that:

> By only offering to execute a "contract" with Madera and Chowchilla which contained the language of Article 14 giving the Secretary the unilateral right to modify and amend the terms of the contracts without the consent of the districts, Defendants failed to perform their legal statutory and contractual obligations to renew Madera and Chowchilla's Water Service Contracts in that the "contract" offered is a legal nullity.

FAC ¶ 49. In addition to their claim that Article 14(c)(2) violates the due process clause of the Fifth Amendment, plaintiffs assert that the Secretary's insistence that Article 14 be included in their renewal contracts violates the Reclamation Reform Act of 1982 ("RRA"), 43 U.S.C. § 390cc(d).

II.
JURISDICTION

Defendants move to dismiss plaintiffs' claims relating to Article 14 for lack of subject matter jurisdiction. First, defendants assert that the question of the inclusion of Article 14 in plaintiffs' renewal contracts is not yet ripe for adjudication. Second, they argue that the court does not have subject matter jurisdiction over plaintiffs' Article 14 claims because there is no "final agency action" permitting eview under the Administrative Procedure Act, 5 U.S.C. §§ 701 et sec. ("APA") Third, defendants contend that plaintiffs' Article 14 claims cannot be reviewed under the APA because the Tucker Act, 28 U.S.C. §§ 1491 et seq., is a statute which "expressly or impliedly forbids the relief

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water are non-discretionary and not subject to change except as required by applicable law."

which is sought." 5 U.S.C. § 702. Finally, defendants argue that the court lacks jurisdiction because the United States has not waived its sovereign immunity from suit. I address defendants jurisdictional arguments seriatim.

A. Ripeness

By virtue of the case or controversy provision of Article III of the United States Constitution, a federal court may not adjudicate a case unless the issue presented is "ripe" for judicial review. Ripeness turns on "the fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Pacific Gas & Electric Co. v. State Energy Resources Conserv. & Dev. Comm.*, 461 U.S. 190, 201 (1983) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)).

Defendants assert that plaintiffs' claims relative to Article 14 (c) (2) are not ripe for review because defendants have not yet attempted to unilaterally amend plaintiffs' water service renewal contracts. Withholding consideration works no hardship on plaintiffs, defendants argue, because the terms of Article 14(c)(2) grant plaintiffs the right to challenge defendants' subsequent amendments to the contract. Plaintiffs complaint, however, is that defendants' insistence that Article 14(c) (2) be included in any water service renewal contract executed between the parties interferes with the plaintiffs' existing rights under the 1939 Contract, and under the Constitution.

The court is satisfied that the question of whether the inclusion of Article 14 (c) (2) violates plaintiffs' rights is ripe for judicial decision. It is true that Article 14 (c) (2) preserves plaintiffs' right to attack the legality of any future amendments, but the preservation of

that issue is beside the point. Plaintiffs complain about the inclusion of the clause itself, and by executing a water service renewal contract with proposed Article 14(c) (2) , plaintiffs would perforce waive their right to object to that provision. The defendants' motion to dismiss plaintiffs' complaint on this basis is DENIED.

B. Sovereign Immunity

In the absence of an explicit waiver, claims against the federal government are barred by sovereign immunity. *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1484 (9th cir.), cert. denied, 474 U.S. 931 (1985). The administrative Procedure Act waives the United States' sovereign immunity from suit for a claim properly brought under the Act. See 5 U.S.C. § 702. Moreover, when suit is properly brought pursuant to the APA, jurisdiction exists by virtue of 28 U.S.C. S 1331. *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

Both plaintiffs and Intervenors argue that sovereign immunity is waived by virtue of the APA . I do not agree. The plaintiffs' claims relative to waiver under the APA falter by virtue of the preclusion of review provisions of the Act. The waiver of sovereign immunity under the APA is limited by the proviso that "nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C.§ 702. Thus although the APA waives sovereign immunity and 28 U.S.C. § 1331 confers jurisdiction for claims under the APA, the waiver is subject "to preclusion-of-review statutes created or retained by Congress." *Califano*, 430 U.S. at 105.

The Tucker Act provides the United States Claims Court with jurisdiction over any claim against the United States founded . . . upon any express or implied contract with the United States. 28 U.S.C. § 1491(a)(l). The district court exercises jurisdiction concurrently with the claims court over contract claims against the United States involving less than $10,000. 28 U.S.C. §1346(a)(2). The Tucker Act thus provides a limited waiver of sovereign immunity and prescribes the remedies available in actions on government contracts. *North Side Lumber*, 753 F.2d at 1484-85 (citing *Mesapulse. Inc. v. Lewis*, 672 F.2d 959, .967 (D.C. cir. 1982)). Under the Tucker Act as originally adopted, the claims court could grant money damages, but neither injunctive relief, *United States v. Jones*, 131 U.S. 1 (1889), nor declaratory relief. *United States v. Kina*, 395 U.S. 1 (1969). Although the Ninth Circuit has twice held that the Tucker Act "does not preclude review of agency action when the relief sought is other than money damages," *Laquna Hermosa Corp. v. Martin*, 643 F.2d 1376, 1379 (9th cir. 1981) ; *Rowe v. United States*, 633 F.2d 799, 802 (9th cir. 1980), cert, denied, 451 U.S. 970 (1981). in *North Side Lumber*, a panel of the court limited those cases to their facts, holding that the claims asserted although contract-related "rested at bottom on statutory rights." *North Side Lumber*, 753 F.2d at 1485. The court then extended the restrictions on the relief the claims court may award in contract actions to district courts, holding that "the Tucker Act 'impliedly forbids' declaratory and injunctive relief and precludes a §702 waiver of sovereign immunity in suits on government contracts." Id. The current jurisdictional statute permits the claims court to grant declaratory relief in contract claims brought before the contract is awarded, and to grant limited equitable relief, 28 U.S.C. § 1491(a) (2)-(3) ; see also *Bowen v. Massachusetts*, 487 U.S. 879, 905 n.40 (1988).

Remarkably, the Circuit has rejected the proposition that section 1491(a) expands the jurisdiction of the district court. *Price v. United States General Services Administration,* 894 F.2d 323, 324 n.4 (9th cir. 1990).

The United States argues that plaintiffs' claim here is, at bottom, based on contract. It thus concludes that under *North Side Lumber* the court may not grant declaratory or injunctive relief on plaintiffs' claims.

Plaintiffs and Intervenors rely on Judge Wallace's concurring opinion in *Pacificorp v. Federal Energy Regulatory Commission,* 795 F.2d 816, 825-27 (9th cir. 1986), to distinguish *North Side Lumber* from the matter at bar. Judge Wallace observed there that "jurisdiction under the Tucker Act is not exclusive where other statutes independently confer jurisdiction and waive sovereign immunity." Id. at 826 (citing *Munoz v. Small Business Administration,* 644 F.2d 1361, 1364-65 (9th Cir. 1981)) . Plaintiffs and Intervenors point to 43 U.S.C. §390uu and argue that the section both confers subject matter jurisdiction on the court and waives sovereign immunity. I agree.

Section 390uu waives the United States' sovereign immunity in a suit to "adjudicate, confirm, validate, or decree" the rights of a contracting entity and the United States regarding any contract executed pursuant to the Federal reclamation laws.[9] Despite the defendants' ar-

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[9]43 U.S.C. § 390uu provides: "Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law. The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty, and shall be subject to judgments, orders,

guments to the contrary, section 390uu applies to the dispute before the court because plaintiffs have asked the court to adjudicate their rights under the 1939, 1950 and 1951 Contracts executed with the United States pursuant to the Federal reclamation laws.

In *Bostwick Irrigation District v. United States,* 900 F.2d 1285, 1287 (8th Cir. 1990), plaintiff irrigation districts brought a declaratory judgment action under 43 U.S.C. § 390uu, seeking to "enjoin the Bureau of Reclamation . . . from charging the Districts for expenses incurred . . . for operation and maintenance of a dam and reservoir." Without exploring the basis for jurisdiction, the court held that the Bureau was authorized by statute to collect operation and maintenance costs, and that the water user's contracts with the Department of Interior require repayment of those costs. Id. at 1289-90. *Bostwick's* lack of analysis makes it weak authority for the proposition that section 390uu is an unequivocal grant of subject matter jurisdiction over disputes involving interpretation of contracts executed pursuant to Federal reclamation law. Nonetheless, the language of the statute and its legislative history demonstrate that the Eighth Circuit reached the correct conclusion.

It is true that section 390uu could be read very narrowly as a venue provision rather than as conferring subject matter jurisdiction. This possibility however, is resolved by an examination of the legislative history of section 390uu. See *Mid Valley Bank v.*

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and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. Any suit pursuant to this section may be brought in any United States district court in the State in which the land involved in situated."

North Valley Bank, ___ F. Supp.___ (E.D. Cal. May 21, 1991) sl. op. at 9 (in the absence of authoritative construction ambiguity of statute first to be resolved if possible by resort to legislative history). The Senate report on the bill specifically notes that the section is a jurisdictional grant. See S. Rep. No. 373, 97th Cong., 2d Sess. 18, reprinted in 1982 U.S. Code Cong. & Admin. News 2570, 2572[10]

I conclude, following Judge Wallace's reasoning in *Pacificorp*, that plaintiffs' claims are not precluded by the Tucker Act because section 390uu provides an independent jurisdictional basis and waiver of sovereign immunity.

III
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Both the United States and Intervenors move to dismiss plaintiffs' claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. That motion must be granted.

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10 The report reads in pertinent part "[t]his section gives the consent of the United States to be sued concerning the contractual rights of persons or entities who are parties or beneficiaries of water service or repayment contracts. . . - In some instances, written representations were made to the water users concerning the interpretation of the reclamation law or of contract provisions which may have influenced the water users' decision to consummate the contract. This section provides access to the courts for parties or beneficiaries seeking to reform such contracts to be in accord with the terms of such representations or other appropriate relief. The conditions of this permission are clear in the text." S. Rep. No. 373, 97th Cong., 2d Sess. 18, reprinted in 1982 U.S. Code Cong. & Admin. News 2570, 2582.

A. Standard

On a motion to dismiss, the allegations of the complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972). The court is bound to give the plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. *Retail Clerks International Ass'n v. Shermahorn*, 373 U.S. 746, 753 n.6 (1963). Thus, the plaintiff need not necessarily plead a particular fact if that fact is a reasonable inference from facts properly alleged. Id. See also *Wheeldin v. Wheeler*, 373 U.S. 647, 648 (1963) (inferring fact from allegations of complaint).

In general, the complaint is construed favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). So construed, the court may not dismiss the complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief. *Hishon v. King & Spaulding*, 467. U.S. 69 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In spite of the deference the court is bound to pay to the plaintiff's allegations, however, it is not proper for the court to assume that "the [plaintiff] can prove facts which [he or she] has not alleged, or that the defendants have violated the laws in ways that have not been alleged.'" *Associated General Contractors v. California State Council*, 459 U.S. 519, 526 (1983).

B. Article 14(c) (2) Claims

In their first three claims for relief, plaintiffs allege that defendants owe them a duty, arising out of the 1939 Contract and 43 U.S.C. § 485 et seq., to renew their water service contracts. FAC ¶ 60. Plaintiffs al-

lege that defendants' attempt to include the proposed Article 14 in their renewal contracts violates 43 U.S.C. § 390cc(d) and plaintiffs' rights under the Fifth Amendment due process clause.[11]

1. Section 390cc(d)

Plaintiffs' claims resting on 43 U.S.C. § 390cc cannot be reconciled with the language and structure of that section.[12] Under the statute, subsection (d) applies only to subsections (a) (2) and (3) , which describe "amendments" to existing contracts. Because subsection (d) applies to amendments, by its terms, it does not apply to new contracts, including renewal contracts entered into after October 12, 1982. Because subsection 390cc(d) does not apply to renewal contracts, plaintiffs cannot rely on it to state a claim for relief relative to the language the government proposes to include

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11 It is unclear whether plaintiffs also allege a claim under, the contract clause, Art. 1, § 10 of the United States, Constitution. Because the contract clause does not apply to the federal government, *Peterson v. United States Dept. of Interior*, 899 F.2d 799, 807 n.15 (9th cir.), cert. denied, ___U.S. ____ 112 L. Ed. 2d 574 (1990), to the extent that plaintiffs do assert such a claim, defendants' motion to dismiss is granted.

12 Section 390cc provides in pertinent part: "(a) Generally. The provisions of this subchapter shall be applicable to any district which--

(1) enters into a contract with the Secretary subsequent to October 12, 1982;

(2) enters into any amendment of its contract with the Secretary subsequent to October 12, 1982, which enables the district to receive supplemental or additional benefits; or

(3) which amends its contract for the purpose of conforming to the provisions of this subchapter. . . .

(d) Consent of non-Federal party. Amendments to contracts which are not required by the provisions of this subchapter shall not be made without the consent of the non-Federal party." 43 U.S.C. § 390cc.

in their renewal contracts. Thus plaintiffs have failed to state a claim under section 390cc.

2. Due Process

Plaintiffs also assert that the inclusion of proposed Article 14 (c) (2) in their renewal contracts would constitute a deprivation of property without due process of law prohibited by the Fifth Amendment to the United States Constitution.[13] Plaintiffs' memo in support of motion for preliminary injunction at 16-18. Defendants seek dismissal on various grounds.

As a threshold matter, defendants and Intervenors argue that the plaintiff irrigation districts are not "persons" within the meaning of the due process clause of the Fifth Amendment. According to defendants, because the states are not persons within the meaning of the clause, *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966), irrigation districts, as state agencies, may not assert Fifth Amendment claims.

At least one district court has concluded that it is doubtful that *South Carolina v. Katzenbach* applies to state-created public corporations like water districts. *Metropolitan Water District of Southern Cal. v. United States*, 628 F. Supp. 1018, 1023 n.6 (S.D. Cal. 1986), rev'd on other grounds, 830 F.2d 139 (9th cir. 1987), aff'd sub. nom. *California v. United States*, 490 U.S. 920 (1989). Id. As Judge Brewster noted, corporations are "persons" within the meaning of the Fifth Amendment, and water districts are public corporations. Id.; see also *Truckee-Carson Irrigation District v.*

[13] The Fifth Amendment due process clause provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V, cl. 3.

Secretary of Dept. of Interior, 742 F.2d 527 (9th cir. 1984) assuming without deciding that irrigation district is person within meaning of Fifth Amendment), cert. denied, 472 U.S. 1007 (1985). But see *El Paso County Water Improvement Dist. No. 1 v. IBWC/US*, 701 F. Supp. 121 (W.D. Tex. 1988) (concluding without analysis that county water district, a political subdivision of the state, not "person" within meaning of Fifth Amendment). I concur with the reasoning in *Metropolitan Water District*, and conclude that plaintiff irrigation districts are persons within the meaning of the Fifth Amendment due process clause. Having so concluded, I must now determine whether plaintiffs have stated a claim under the Constitution.

Plaintiffs may state a claim under the Fifth Amendment due process clause only if they possess a property right protected by the Constitution. *Peterson v. United States Dept. of Interior*, 899 F.2d 799, 807 (9th Cir.), cert. denied, ___U.S.___112 Ed. 2d 574 (1990). Plaintiffs assert that they have a property right to a continued supply of project water assured to them by the 1939 contract when they assigned the dam site and the water rights on the San Joaquin River to the United States." Plaintiffs' memo in opposition to defendants' motion to dismiss at 22:4-7. Plaintiffs argue that they are entitled under the 1939 Contract to a renewal contract, and that the proposed Article 14(c)(2), because it permits unilateral amendment, renders the contract a "legal nullity." Id. at 22:7-10.

The Secretary proposes to include the disputed Article 14 (c) (2) in plaintiffs' renewal contracts in order to fulfill his statutory obligations under NEPA and ESA. Article 14(c)(2) provides that plaintiffs' water service renewal contracts "are subject to modification by the United States, after public meetings and

discussions with the Contractor, in accordance with the results of the final EIS and ESA consultation" conducted pursuant to NEPA and ESA. The proposed article, however, preserves plaintiffs' right to challenge the legality and validity of any such modifications made to [the] contract pursuant to this subarticle 14(c)."

Plaintiffs' asserted property interest in a water service renewal contract ultimately rests on the suppressed predicate that by virtue of the previous contracts Congress has surrendered its right to exercise its sovereign power to legislate, and the executive's obligation to act in conformance with legislation. I cannot agree. As I now explain, while plaintiffs may have a right to purchase a supplemental supply of water from the government, derived from their exchange of water and dam site rights in the 1939 Contract, plaintiffs' right is subject to subsequent legislation affecting the exercise of the right.

The Supreme Court has explained that while the government may enter into contracts conferring vested rights "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) ("POSSE") . Accordingly, contractual arrangements, including those to which the government itself is a party, "remain subject to subsequent legislation by the sovereign. Id. In sum, it is established that Congress is not prohibited from enacting legislation simply because it affects the government's contractual agreements. Id.; *Federal Housing Administration v. The Darlinton, Inc.*, 358 U.S. 84, 90 (1958).

An examination of plaintiffs' 1939, 1950 and 1951 Contracts fails to demonstrate an unequivocal waiver of the right to legislate. See *Peterson*, 899 F.2d at 808.[14] Indeed, the language of the contracts appears to reserve Congress' right to exercise its sovereign power. All three contracts provide that they are executed pursuant to the 1902 Federal Reclamation Act, and all acts amendatory or supplementary thereto. 1939 Contract ¶ 1; 1950 Contract at p.l; 1951 Contract at p.l. In addition, the 1939 Contract explicitly recognizes that the plaintiffs' right to purchase water is subject to both congressional action and implementation by regulation.[15]

Plaintiffs rely on *United States v. Larionoff*, 431 U.S. 864, 878-79 (1977), for the proposition that defendants may not include article 14 (c) (2) in plaintiffs' renewal contracts. *Larionoff* held that Congress may not retroactively abrogate a right established under a cont-

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14 It is, to say the least, doubtful that the executive could by contract waive the right of the legislative branch to pass laws. Rather, it would appear that the plaintiffs would have to point to a congressional waiver. Because plaintiffs have failed to do so, but rather rely on contractual documents, I examine the contracts and conclude above that no unequivocal waiver may be found there either.

15 The 1939 Contract provides as follows: "(2) Contracts for water shall be subject to a set of regulations to be issued by the Secretary. . . ;

(3) The United States . . . shall define the classes and quantities of service then and thereafter to be made available and the respective prices and methods of payments therefor;

(4) In the event the performance, in whole or in part, of the obligations of the respective parties under this contract, is hindered, interrupted or prevented by war. . . or by other similar or different acts of civil or military authorities, . . . the obligation of the respective parties under the contract shall be suspended. . . . ;

(5) It is understood that this contract is made contingent upon Congress making the necessary appropriations . . . ."

ract. Id. That holding simply does not bear upon the power of Congress to prospectively alter rights under a contract. In the matter at bar, the Secretary seeks to reserve the right to alter prospectively plaintiffs' contract rights when required to do so in order to comply with the statutory mandates of NEPA and ESA. In the absence of an express waiver of the right of the United States to exercise its sovereign powers, plaintiffs have failed to establish that they have a vested property right to renewal contracts which do not include Article 14 (c) (2) .

For the reasons explained above, I conclude that plaintiffs have failed to state a claim for relief under 43 U.S.C. § 390cc(d) or the Fifth Amendment due process clause. Defendants' motion to dismiss plaintiffs' first three claims for relief is GRANTED.

C. Operation and Maintenance Charge Claims

Section 106 of Pub. L. No. 96-546 requires Central valley Project water contractors to repay any annual operation and maintenance ("O&M") deficit incurred after 1985 at a specified rate.[16] In their fourth claim for relief, Plaintiffs seek a declaration that the

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16 The statute provides: "The Secretary of the Interior shall include in each new or amended contract for the delivery of water from the Central Valley Project provisions ensuring that any annual deficit (outstanding or hereafter arising) incurred by a Central Valley Project water contractor in the payment of operation and maintenance costs of the Central Valley Project is repaid by such contractor under the terms of such new or amended contract together with interest on any such deficit which arises on or after October 1, 1985, at a rate equal to the average market yields' on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the applicable reimbursement period of the project, adjusted to the nearest one- eighth of 1 percent." Water Resource and Small Reclamation Projects, Pub. L. No. 99-546, S 106, 1986 U.S. Code Cong. & Admin. News 100 (Stat.) 3052.

0&M charges which defendants seek to impose under the statute are unenforceable against plaintiffs.

The O&M charges in dispute are the difference between the 1950 and 1951 Contract rate of $3.50 per acre-foot for Class 1 water and $1.50 per acre-foot for Class 2 water, and what the United States has determined was the actual cost of operation and maintenance of the CVP chargeable to Madera and Chowchilla during the term of those contracts. FAC ¶ 55. The amount of 0&M charges for Madera through 1989 totals $3,495,360, and for Chowchilla, $2,311,921. Id.

The plaintiffs attack the imposition of 0&M charges on a variety of grounds. They allege that retroactive imposition of the proposed 0&M charges is a breach of the 1950 and 1951 Contracts because they result in rates greater than those contracted for in those agreements. Plaintiffs also allege that the charges breach the 1939 and 1951 Contract provisions assuring that these plaintiffs would be charged at rates no greater than those charged other districts within the Friant Dam service area. The 0&M charges are also said to be a breach of contract because they are alleged to include charges for operation and maintenance of the Madera Canal despite the fact that under the 1939 Contract the United States agreed to build the Madera. Canal for the delivery of water to the district

Although plaintiffs do not challenge the actual calculation of the 0&M deficit, they assert that the timing and manner of calculation is improper. They assert that the defendants had an obligation under 43 USC § 285h-1(3) to calculate and credit any overpayment made by the Plaintiffs. According to the complaint, the defendants delayed doing so and then, in 1988, adopted new pricing criteria which resulted in a

retroactive increase "to a rate higher that other districts in the Friant Service Area." FAC ¶ 56(e).

Finally, plaintiffs allege that .the 0&M charges violate rights protected by the contract and due process provisions of the Constitution. I address each theory in turn.

1. Rates Inconsistent With Contract Provisions

Plaintiffs first claim that the 0&M charges are inconsistent with the rates provided for in the various water service contracts. Plaintiffs point to the provisions of the 1950 and 1951 Contracts which provide:

> The contracting officer will, on or before February 15 of each calendar year, by a written notice, announce to the District the rates of payment to be made by the District for all water to be delivered to it pursuant to this contract during the ensuing year, but in no event shall the rates so announced be in excess of three dollars and fifty cents ($3.50) per acre-foot for Class one water and one dollar and fifty cents ($1.50) per acre-foot for Class two water.

They argue that under the terms of the contracts, 3.50 and $1.50 are the maximum rates they may be charged for the delivery of water. The complaint then alleges that "the imposition of the operation and maintenance deficit results in a doubling or tripling of these charges for many years." FAC ¶56(a). These allegations fail to state a claim.

As noted above, by their own terms, all the contracts entered into between the plaintiffs and the United States were made pursuant to the Reclamation Act

and statutes amending or supplementing the Act. Both the Reclamation Act itself and Public Law 99-546, require that plaintiffs pay a share of 0&M. The Act requires that contracts "to furnish water for irrigation purposes . . . shall be . . . at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operating and maintenance cost. 43 U.S.C. § 485h(e). The statute further provides that any contract, relating to construction charges "shall require advance payment of adequate operation and maintenance charges." 43 U.S.C. § 485e. These statutes require the Secretary to set rates which in his opinion suffice to recapture an appropriate amount of operation and maintenance charges. Because the rates set in fact failed to recapture 0&M, the 1986 amendment requires that any annual deficit outstanding or hereafter arising must be repaid. Pub. L. No. 99-546r § 106 (emphasis supplied). Plaintiffs' argument that the rates fixed in the contracts preclude the government from collecting 0&M charges cannot lie. The contracts recognized that they are subordinate to the reclamation statutes and their amendments, and those statutes and amendments clearly compel the payment by the plaintiffs of proportionate 0&M charges.[17]

Although plaintiffs do not make an argument predicated upon the notion that the statutes do not mandate a recapture of a proportionate share of all 0&M actual expended by the government, such an argument could be made. Thus it could be argued that 43 U.S.C. § 485h(e) does not require the Secretary to establish a charge equal to a proportionate share of 0&M,

[17]Even if the contracts did not recognize that they were subordinate to the statutes, under the court's analysis of reserved sovereign power, supra, the result would be the same.

but only an appropriate share. From that language, it could be argued that the Secretary was not required to charge the full amount, but rather was granted discretion to charge a lesser amount upon unspecified standards. Finally, it could be suggested that in executing the contracts with the districts at a fixed amount the Secretary had exercised that discretion, and thus discharged his statutory duty. While such an argument appears to the court to be more coherent than any actually made by the plaintiffs, as I now explain, I do not think it can prevail.

Even assuming arguendo that the contracts relied upon by plaintiffs represented an exercise of discretion authorized by the original Reclamation Act, section 106 of Pub. L. No 99-546 requires that renewal contracts ensure that any outstanding deficits in the payment of 0&M are repaid. The court must acknowledge that this obligation is also not without ambiguity. Thus an outstanding deficit may refer to charged but unpaid 0&M obligations rather than the difference between the amount charged for water service and the actual 0&M cost. This ambiguity, however, has been resolved by the Secretary's determination as to the meaning of the statute inherent in the charges challenged here. Such a contemporaneous administrative determination is, under appropriate circumstances, entitled to deference from the court. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984) ; see also *Catholic Social Services. Inc. v. Meese*, 685 F. Supp. 1149, 1152 (E.D. Cal. 1988) (administrative interpretation entitled to deference if "linguistically possible . . . and . . . consistent with the statutory purpose") . Interpreting section 106 to require recapture of a proportionate share of actual 0&M is certainly consistent with the statutory language and nothing before the court suggests such an

interpretation is inconsistent with the statutory purpose.

For all the above reasons, I conclude that plaintiffs' allegation that the 0&M charges are inconsistent with the specified contract price must fail.

2. Prices No Higher Than Charged Other Districts

Plaintiffs point to those provisions of the 1939 and 1951 Contracts which provide in substance that the rates to be charged them shall not exceed charges made to others for the same class of water and services. See 1939 Contract ¶ 14 (e) ; 1951 Contract ¶ 4. Plaintiffs have not alleged that the calculation of 0&M charges is faulty, only that it results in delivery rates exceeding those charged others in the service area. While it is true that the water service contracts contain such provisions, once again they are subject to the reclamation statutes and their amendments. Because the Reclamation Act and Public Law No. 99-546 require the imposition of 0&M charges to the extent those charges result in a rate for delivery of water to these plaintiffs greater than that charged other users the contracts, in effect, contemplated such a result.

3. Failure to Comply With Section 485h-l

The plaintiffs allege that the defendants delayed performance of their obligation under section 485h-1(3) to calculate overpayment of 0&M from July 2, 1956 until 1988. They then allege that when such determinations were made the Secretary 'adopted new pricing criteria thereby increasing the proposed charges to Madera and Chowchilla to a rate higher than other districts in the Friant service area." Once again, the districts do not claim a deficiency in the calculations.

Rather, the districts maintain that the defendants' alleged delay and calculation procedure somehow prevents application of § 106 of Public Law No. 99-546.

The court is, to say the least, perplexed by the allegations. The plaintiffs make no attempt in their Points and Authorities in Opposition to the Motion to Dismiss to defend this claim. Moreover, neither in their complaint, nor in their briefing, do plaintiffs claim that they were entitled to a credit because they in fact overpaid.

Given the fact that plaintiffs have not sought to defend this allegation, it may well be that they have sub silentio conceded that dismissal is appropriate. In any event, plaintiffs' silence seems quite appropriate. The statute provides the Secretary with broad discretion to fix rates such that the revenues produced will be sufficient to cover both 0&M and fixed charges. 43 U.S.C. § 485h-1(3).[18] Any credits to which plaintiffs would be entitled to apply only after a district has paid its appropriate share" of operation and maintenance costs. 43 USC § 485h-(c). While the statute requires the Secretary to credit plaintiffs for operation and maintenance cost over payments, plaintiffs have failed to allege that any such credit was due to them under the statute. Plaintiffs have a continuing obligation to pay maintenance and operation charges. Congress has now directed that when new contracts are executed, contractors are to be charged for preexisting operation and maintenance charges. Given plaintiffs' preexisting statutory obligations incorporated into the contract, and the

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[18]Each such contract shall be for such period, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of such fixed charges as the Secretary deems proper." 43 U.S.C. section 485h-1(3).

reserved sovereign power, plaintiffs may not be heard to complain.

Plaintiffs' complaint about defendants' delay and adoption of new pricing criteria also presents no cognizable claim. If the allegation concerning delay is intended to assert either latches or estoppel, so characterized they fail to state a claim. Generally, laches appear not to apply to the government, *United States v. Ruby Co.*, 588 F.2d 697, 705 n.l0 (9th Cir.), cert. denied, 442 U.S. 917 (1979), and the plaintiffs have clearly failed to allege facts rising to the stringent standards required for estoppel. *Office of Personnel Management v. Richmond*, 110 L. Ed. 2d 387 (1990); I 779 F.2d 569r 571-72 (9th cir. 1986). Finally, given the; Secretary's broad discretion to fix rates, noted above, the: plaintiffs' complaint concerning the adoption of new pricing criteria does not appear to present a cognizable claim.

4. Madera Canal Charges

Plaintiffs allege that since the 0&M charges include claims relating to operation and maintenance of the Madera Canal, they breach the 1939 contractual obligation of the United States to build the canal to supply water to the districts. With the greatest of respect this allegation is simply a non sequitor. The agreement of the United States to build the canal certainly does not encompass an obligation to operate and maintain the canal without cost to the district. Moreover, given the statutory obligation of the Secretary to recapture 0&M, the obligation to build the canal cannot be read as creating an ambiguity concerning the intent of the parties relative to operation and maintenance. These allegations state no claim.

5. Constitutional Claims

As noted in the discussion above concerning proposed Article 14(c)(2), plaintiffs can point to no language in the federal reclamation laws or in the contracts themselves that suggests, much less demonstrates, that the government surrendered its sovereign power to legislate in enacting its previous contracts with plaintiffs. In the absence of such a waiver, plaintiffs have no property right under the Fifth Amendment due process clause. Moreover, as noted above, the impairment of contracts provision does not apply to the federal government. Plaintiffs' fourth claim must be dismissed for failure to state a claim upon which relief may be granted

ORDER

For the reasons set forth above, the court hereby grants defendants' motion to dismiss plaintiffs' complaint for failure to state a claim upon which relief may be granted. Accordingly, plaintiffs' motion for interlocutory injunctive relief must be DENIED.

Because the court cannot say with certainty that plaintiffs cannot state a claim, they are granted thirty (30) days from the effective date of this order to file an amended complaint. The court urges that if plaintiffs believe the court has erred and have no other theory of recovery, they suffer dismissal and appeal rather than extend these proceedings unnecessarily.

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IT IS SO ORDERED.

DATED: June 14, 1991.

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT
COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MADERA IRRIGATION DISTRICT,
CHOWCHILLA WATER DISTRICT,

NO. CIV. 5-91-242 LKK

Plaintiffs,

v. ORDER

LAFiRENCE HANCOCK, etc., et al.,

Defendants.

NATURAL RESOURCES DEFENSE
COUNCIL, et al.,

Intervenors

On June 17, 1991 the court entered its order granting defendants' motion to dismiss, and denying plaintiffs' motion for preliminary injunction. The court granted plaintiffs thirty (30) within which to file an amended complaint stating a claim for relief. Plaintiffs have informed the court that they do not intend to file an amended complaint. Accordingly, final judgment is now entered and the clerk of court is directed to close this case.

IT IS SO ORDERED.
DATED: July 1, 1991.

S/ Lawrence K. Karlton
LAWRENCE K. KARLTON
CHIEF JUIDGE EMERITUS
UNITED STATES DISTRICT COURT

CONSTITUTION OF THE UNITED STATES:

The Fifth Amendment due process clause provides:

> **"No person shall . . . be deprived of life, liberty, or property, without due process of law."**

U.S. Const. amend. V, cl. 3

STATUTES:

1. Pub. L. No. 99-546 § 106:

"The Secretary of the Interior shall include in each new or amended contract for the delivery of water from the Central Valley Project provisions ensuring that any annual deficit (outstanding or hereafter arising) incurred by a Central Valley Project water contractor in the payment of operation and maintenance costs of the Central Valley Project is repaid by such contractor under the terms of such new or amended contract together with interest on any such deficit which arises on or after October 1, 1985, at a rate equal to the average market yields' on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the applicable reimbursement period of the project, adjusted to the nearest one- eighth of 1 percent." Water Resource and Small Reclamation Projects, Pub. L. No. 99-546, S 106, 1986 U.S. Code Cong. & Admin. News 100 (Stat.) 3052.

43 U.S.C. § 390uu provides:

"Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law.

The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty, and shall be subject to judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. Any suit pursuant to this section may be brought in any United States district court in the State in which the land involved in situated."

CONTRACT PROVISION:

Article 14(c)(l)

The Secretary has undertaken the San Joaquin Basin Resource Management Initiative, as described in the Federal Register notice of December 29, 1989, 54 Fed. Reg. 53763. (2) The United States and the Contractor [Madera] agree that the Secretary will also complete a programmatic Environmental Impact Statement (EIS) in accordance with the National Environmental Policy Act (NEPA) and a consultn-tion in accordance with Section 7 of the Endangered Species Act (ESA) studying the environmental impacts associated with the execution and renewal of this and other water service contracts in the Friant Unit of the Central Valley Project and with the continued diversion and delivery of water thereunder. The United States and the Contractor further agree that the provisions of this contract are subject to modification by the United States, after public meetings and discussions with the Contractor, in accordance with the results of the final EIS and ESA consultation referenced in the immediately preceding sentence and ESA and NEPA: *Provided*, that the Contractor reserves and does not waive any right it may have to challenge the legality and validity of any such modifications made to this contract pursuant to

this subarticle 14(c). Notwithstanding any other provision of this contract (including the preceding sentences of this subarticle), the provisions of this contract covering the right to long-term renewal and quantity of water are non-discretionary and not subject to change except as required by applicable law.

Supreme Court, U.S.
FILED
JUL 1 1993
OFFICE OF THE CLERK

No. 92-1727

In the Supreme Court of the United States

OCTOBER TERM, 1993

MADERA IRRIGATION DISTRICT, PETITIONER

v.

LAWRENCE F. HANCOCK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Section 106 of the Act of October 27, 1986, Pub. L. No. 99-546, 100 Stat. 3052, requires the Secretary of the Interior to include in each new or amended contract for the delivery of water from the Central Valley Project provisions ensuring that the United States recoups operation and maintenance deficits incurred under prior water service contracts. The questions presented are:

1. Whether Section 106 deprives petitioner, an irrigation district that seeks to renew a water delivery contract, of vested rights protected by the Fifth Amendment.

2. Whether the Secretary of the Interior violated petitioner's contractual rights by proposing a renewal contract that would allow the Secretary to modify the contract in response to a review under the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, and consultation under the Endangered Species Act, 7 U.S.C. 1531 *et seq.*, but would reserve to petitioner all existing rights to challenge the legality and validity of any such modifications.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Alpine Ridge Group v. *Kemp*, 955 F.2d 1382 (9th Cir. 1992), rev'd, 113 S. Ct. 1898 (1993))	9
Bowen v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986)	11
Cisneros v. *Alpine Ridge Group*, 113 S. Ct. 1898 (1993)	9
Ivanhoe Irrigation District v. *McCracken*, 357 U.S. 275 (1958)	2
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982)	11
Nampa & Meridian Irrigation District v. *Bond*, 268 U.S. 50 (1925)	6
Torncello v. *United States*, 681 F.2d 756 (Ct. Cl. 1982)	11

Constitution and statutes:

U.S. Const. Amend. V	6, 7
Act of Oct. 27, 1986, Pub. L. No. 99-546, § 106, 100 Stat. 3052	5, 6, 7, 8, 9, 10, 11
Central Valley Project Improvement Act, Pub. L. No. 102-575, § 3404, 106 Stat. 4708-4709	4
Endangered Species Act, § 7, 16 U.S.C. 1536	6
National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*	6
Reclamation Act of 1902, ch. 1093, 32 Stat. 388, 43 U.S.C. 391 *et seq.*	2
Reclamation Project Act of 1939, § 9(e), 43 U.S.C. 485h(e)	3, 4

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. A1-A22) is reported at 985 F.2d 1397. The opinion of the district court (Pet. App. B1-B29) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1993, and amended on March 8, 1993. A petition for rehearing was denied on March 29, 1993. The petition for a writ of certiorari was filed on April 28, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States has constructed and operates numerous reclamation projects, which provide water for crop irrigation and other uses in the arid western States. The Central Valley Project (CVP) in California is the largest of those projects. One of the principal CVP facilities is Friant Dam, located on the San Joaquin River near Friant, California. That dam created Millerton Lake, from which waters are diverted into the Madera and Friant-Kern Canals. The Madera Canal services petitioner Madera Irrigation District and the Chowchilla Water District. See generally *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 279-283 (1958).

In 1939, prior to construction of Friant Dam, petitioner and the United States (acting through the Department of the Interior's Bureau of Reclamation) entered into a contract pursuant to the Reclamation Act of 1902, ch. 1093, 32 Stat. 388, 43 U.S.C. 391 *et seq.*, and "acts amendatory or supplementary thereto." See Pet. App. B2-B3. The 1939 Contract recited that petitioner had earlier obtained property rights to the site of the then-contemplated Friant Dam, as well as certain water rights, and that petitioner was willing to convey those rights to the United States in return for petitioner's receiving a supplemental water supply from Friant Dam. See *id.* at A2-A3.

Article 14 of the 1939 Contract addressed petitioner's right to purchase CVP water. Article 14(a) stated that Madera "shall be entitled * * * to purchase a supplemental supply of water from Friant Dam and Reservoir" in a designated average annual maximum amount. Pet. App. B3 n.2. Article 14(e) additionally stated in relevant part:

> Whenever the United States shall be prepared to furnish service for irrigation or other purposes from Friant Reservoir and at a date not later than that upon which water shall be offered for sale to any prospective water user, the United States shall notify the District in writing relative to the availability and character of such service, and shall define the classes and quantities of service then and thereafter to be made available and the respective prices and methods of payment therefor. * * * It is mutually understood between the parties hereto that it is not possible at this time to fix a price to be paid by the District for said water, but the United States agrees that the cost of said water to the District shall not exceed charges made to others than the District for the same class of water and service from the said Friant Dam and Reservoir.

Gov't Supp. Exc. Rec. 92.

In 1951, following construction of the Friant Dam and the Madera Canal, petitioner and the United States entered into a contract pursuant to the federal reclamation laws. The 1951 Contract's explanatory recitals noted that the parties had previously entered into the 1939 Contract "under the terms of which [petitioner], subject to the terms and conditions therein set forth, became entitled to purchase from Friant Dam and Reservoir * * * a permanent supplemental supply of [water]." Gov't Supp. Exc. Rec. 98. Part A of the 1951 Contract (Articles 3 through 11) contained water service provisions in accordance with Section 9(e) of the Reclamation Project Act of 1939, 43 U.S.C. 485h(e), and provided for the delivery of

CVP water to petitioner through the Madera Canal. Gov't Supp. Exc. Rec. 105-118.[1]

Article 3 of the 1951 Contract provided that Part A would "remain in effect for a period of forty (40) years commencing with the year in which the initial delivery date occurs." Gov't Supp. Exc. Rec. 105. Article 4 recognized that "[t]he executory portions of the 1939 Contract [as modified and amended] remain and shall remain in full force and effect, and the parties, upon the expiration of the term of Part A hereof, shall be entitled to all of the rights conferred upon them by article 14 of the 1939 contract and shall be subject to all of the terms and conditions of said article." Gov't Supp. Exc. Rec. 105. Article 4 further stated that "[u]nder this Part A and under the succeeding contracts the rates to be charged the District for water service shall not exceed charges made to others than the District for the same class of water and service from Friant Dam and Reservoir." *Id.* at 106. See Pet. App. A9.

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[1] Section 9(e) authorizes the Secretary of the Interior to enter into long-term and short-term contracts to furnish federal reclamation project water for irrigation purposes. Section 9(e) states that water service contracts shall be for periods not to exceed forty years and shall be "at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation." 43 U.S.C. 485h(e). Congress recently revised the application of Section 9(e) to CVP water service contracts. See Central Valley Project Improvement Act, Pub. L. No. 102-575, § 3404, 106 Stat. 4708-4709.

Article 5 of the 1951 Contract provided for annual delivery to petitioner of up to 85,000 acre-feet of "Class One" water and a maximum of 186,000 acre-feet of "Class Two" water. Gov't Supp. Exc. Rec. 107. (Class One water comprises a more dependable source of supply than Class Two water). Article 7(a) stated that the maximum rate of payment for Class One water shall be $3.50 per acre-foot and the maximum rate of payment for Class Two water shall be $1.50 per acre-foot. Pet. App. A3.

2. Part A of the 1951 Contract was scheduled to expire on February 29, 1992. As that date approached, the parties commenced negotiations for a renewal contract. Pet. App. A4. The parties, however, were unable to reach an agreement, and petitioner initiated this suit. Petitioner's amended complaint acknowledged that the Secretary of the Interior had offered a renewal contract. Petitioner alleged, however, that the proposed renewal contract contained various provisions that violated petitioner's rights under the 1939 and 1951 contracts. Gov't Supp. Exc. Rec. 1.

Petitioner objected to the Secretary's proposed water service charges, which the Secretary had formulated in accordance with legislation enacted after the parties entered into the 1951 Contract. Specifically, Section 106 of the Act of October 27, 1986, Pub. L. No. 99-546, 100 Stat. 3052, states:

> The Secretary of the Interior shall include in each new or amended contract for the delivery of water from the Central Valley project provisions ensuring that any annual deficit (outstanding or hereafter arising) incurred by a Central Valley project water contractor in the payment of operation and maintenance costs of the Central

> Valley project is repaid by such contractor under the terms of such new or amended contract, together with interest on any such deficit which arises on or after October 1, 1985, at a rate equal to the average market yields on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the applicable reimbursement period of the project, adjusted to the nearest one-eighth of 1 percent.

The charges that petitioner had paid for water under the 1951 Contract were inadequate to repay the government for the annual operation and maintenance costs (O&M costs) that were allocable to petitioner and incurred while that contract was in effect. See Pet. App. A6, B21. See generally *Nampa & Meridian Irrigation District* v. *Bond*, 268 U.S. 50, 53 (1925) (describing O&M costs). The Secretary accordingly included cost provisions in the proposed renewal contract sufficient to recapture that deficit, as well as to repay annual O&M costs in future years. Petitioner asserted that the charges required by Section 106 would deprive it of contractual property rights in violation of the Fifth Amendment of the United States Constitution.

Petitioner also objected to portions of the proposed Article 14(c) of the contract. That provision explains, *inter alia*, that the Secretary is preparing an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, and is also undertaking consultation pursuant to Section 7 of the Endangered Species Act (ESA), 16 U.S.C. 1536, concerning, among other things, the renewal of water service contracts for the Friant Unit of the CVP. The proposed Article 14(c)

provides that the contracting parties agree that the contract is subject to modification by the United States in accordance with the final EIS and the ESA consultation, but reserves petitioner's rights "to challenge the legality and the validity of any such modifications." Pet. App. B6-B7 n.8. Petitioner contended that this proposed provision also violated its Fifth Amendment rights.

3. The government and various intervenors moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court granted the motions to dismiss, Pet. App. B1-B29, and the court of appeals affirmed, *id.* at A1-A22.

The court of appeals determined that Section 106's requirement that new and amended contracts include rates that recoup past O&M deficits did not violate petitioner's contractual rights, because neither the 1939 Contract nor the 1951 Contract established a set rate at which water must be offered to petitioner in a renewal contract. Pet. App. A11-A12. The court rejected petitioner's contention that the O&M recoupment provision amounted to a retroactive adjustment of the rates established and paid under the 1951 Contract. As the court explained: "The means by which the price of new water will be established looks retroactively at the costs of supplying the old water, but [petitioner] could not be forced to pay the money in the absence of a renewal contract, so it is a charge for new water calculated on the basis of the old water, rather than an additional charge for the old water." *Id.* at A12.

Next, the court of appeals addressed petitioner's assertion that the O&M recoupment provision would result in petitioner's paying higher rates for water service than other Friant Unit contractors, allegedly

in violation of the 1939 and 1951 Contracts, which state that petitioner shall not be charged costs or rates for water service in excess of charges made to others for the same class of water and service from Friant Dam and Reservoir. The court rejected that argument. It explained that all water contractors are subject to the O&M recoupment provision, that the variation in rates among contractors reflected differences in the service provided, and that the United States had not surrendered its "sovereign authority to charge more for water service with a higher operation and maintenance cost." Pet. App. A13-A15.

Finally, the court of appeals rejected petitioner's contention that Article 14(c) of the proposed renewal contract would render the contract a nullity and thus breach petitioner's right to enter into a renewal contract. The court suggested that if the government reserved an unlimited right to modify the contract, that reservation would render the proffered contract illusory. The court concluded, however, that Article 14(c) did not have that effect, because it expressly preserves any rights that petitioner may have to challenge the legality and validity of any resulting modifications. Pet. App. A16-A19.

ARGUMENT

1. Petitioner challenges Section 106 of the Act of October 27, 1986, on the ground that it deprives petitioner of "vested contract rights under the Fifth Amendment." Pet. 13-22. The court of appeals correctly rejected that argument based on its reading of the contracts at issue. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals, and its construction of the

particular contracts at issue here does not otherwise warrant review.[2]

a. Petitioner argues (Pet. 15-19) that the Section 106 requirement that any renewal contract offered to petitioner must provide for the recoupment of O&M deficits incurred under previous water service contracts is a unilaterally imposed increase of the prices charged for the water that petitioner had received under the 1951 Contract. Neither the 1939 Contract nor the 1951 Contract, however, precludes the government from setting the water rates in a renewal contract at a level that will recoup the O&M cost deficit incurred by the government under the 1951 Contract.

The 1939 Contract did not set any price for water service, but left the price to be determined at a future date. Indeed, Article 14(e) explicitly acknowledged that "it is not possible at this time to fix a price to be paid by [petitioner] for said water." Pet. App. B3 n.3. The 1951 Contract established a maximum rate of $3.50 per acre-foot for Class One water and of $1.50 per acre-foot for Class Two water, but those rates applied only to the forty-year term of that contract, which expired on February 29, 1992. Petitioner has not pointed to any provision of either contract that precludes the government from setting water rates in a renewal contract at a level sufficient to allow the

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[2] Petitioner asserts (Pet. 23-27) that the court of appeals' decision in this case conflicts with that court's earlier decision in *Alpine Ridge Group* v. *Kemp*, 955 F.2d 1382 (9th Cir. 1992). This Court, however, recently reversed the court of appeals' *Alpine Ridge* decision. See *Cisneros* v. *Alpine Ridge Group*, 113 S. Ct. 1898 (1993). In any event, the Court does not ordinarily grant review to resolve an intra-circuit conflict.

government to recoup O&M deficits incurred under previous contracts.

As the court of appeals correctly explained, the revised water rates are prospective and have no effect on petitioner's past contract, which provided petitioner with a substantial subsidy at taxpayer expense. Congress's decision to set future rates in light of past O&M deficits affects only future obligations under the renewal contract. If petitioner is dissatisfied with the revised water service rates, petitioner remains free to decline to enter into a renewal contract. Pet. App. A11-A13.

b. Petitioner also maintains (Pet. 19-22) that Section 106's requirement that the Secretary recoup petitioner's existing O&M deficit through the imposition of proportionally higher rates in a renewal contract violates provisions of the 1939 Contract and 1951 Contract stating that petitioner's water charges in succeeding contracts shall not exceed charges made to others for "the same class of water and service" from Friant Dam and Reservoir. Section 106, however, does not subject petitioner to discriminatory charges.

Section 106 directs that all water contractors that desire to continue receiving water from the Friant Reservoir are obligated to pay future water rates reflecting their allocable O&M costs. Thus, all of those contractors are treated equally with respect to recoupment of O&M deficits. The fact that Section 106 results in petitioner's paying higher charges than other water users simply reflects that petitioner does not receive the "same class of water and service." As the court of appeals noted, "[s]ervice requiring more expensive operation and maintenance is different from

service requiring less expensive operation and maintenance." Pet. App. A14.

As the court of appeals also pointed out (Pet. App. A7), government contracts must be construed, wherever possible, to avoid foreclosing the exercise of sovereign authority, and sovereign power will remain intact "unless surrendered in unmistakable terms." *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986), quoting *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). Here, the contractual language relied upon by petitioner does not unequivocally surrender Congress's sovereign authority to provide for full recoupment of the government's previously incurred O&M costs, as required by Section 106 of the 1986 Act.

2. Finally, petitioner contends (Pet. 22-23) that Article 14(c) of the proposed renewal contract renders that contract a legal nullity, thus violating petitioner's right to be offered a renewal contract. Petitioner asserts that "[t]he government cannot reserve to itself an unlimited right to escape its contractual obligations 'without rendering its promises illusory and the contract void'" (Pet. 23, quoting *Torncello* v. *United States*, 681 F.2d 756, 760 (Ct. Cl. 1982)). The court of appeals correctly rejected that argument (Pet. App. A17-A19), because Article 14(c) does not purport to confer upon the government an unlimited right to modify the renewal contract. Indeed, Article 14(c) expressly reserves to petitioner all of its currently existing rights to challenge the legal validity of any modification that the government might subsequently make as a consequence of the EIS and the ESA consultation process. Accordingly,

it does not offend petitioner's right to be offered a renewal contract to purchase CVP water.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1993

No. 92-1727

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

MADERA IRRIGATION DISTRICT
Petitioner
vs.
LAWRENCE F. HANCOCK, et al.
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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15 pp

I.

TABLE OF CONTENTS

Page:

ARGUMENT: ..... 1.

A. INTRODUCTION ..... 1.

B. RESPONDENT IGNORES THE CLEAR CONSTITUTIONAL QUESTIONS PRESENTED ..... 1.

1. The Constitutional Issue: ..... 1.

C. THE CONFLICT WITH ALPINE RIDGE GROUP v. KEMP ..... 3.

D. THE RIGHT OF THE UNITED STATES TO RECOUP OPERATION AND MAINTENANCE CHARGES. ..... 3.

1. Respondents' Assertions: ..... 3.

2. The Agreed Price Under The 1951 Contract: ..... 3.

3. § 106 of P.L. 96-546 Is An Attempt By Congress To Increase The Price Paid For Water Under The 1951 Contract: ..... 4.

4. The Contract Provisions: ..... 5.

E. THE FIFTH AMENDMENT CASES ..... 6.

1. Vested Contract Rights
Are To Be Protected: ..... 6.

F. THE SURRENDER IN
UNMISTAKABLE TERMS CASES ..... 7.

1. In General: ..... 7.

G. HARMONIZING THE
TWO APPROACHES ..... 7.

1. The Need To Preserve
Sovereign Rights: ..... 7.

2. The Need To Preserve
Vested Contract Rights: ..... 8.

3. The Proper Test: ..... 8.

H. DOES MADERA'S CONTRACT
CONTAIN AN UNMISTAKABLE
WAIVER ..... 9.

1. How The Waiver Is Made: ..... 9.

2. What Constitutes An
Unmistakable Waiver? ..... 9.

CONCLUSION ..... 10.

II.

TABLE OF AUTHORITIES

CASES:

Page

Bowen v. Agencies Opp. To Soc. Sec. Entrapment,
477 US 41, 91 L.Ed 2d 35, 106 S. Ct. 2390 (1986) ..... 7.

Cisneros v. Alpine Ridge Group,
123 L Ed2d 572, 113, S Ct 1898 (1993) ..... 3.

Home Building & Loan Assn. v. Blaisdell,
290 US 398, 78 L Ed 413, 54 S Ct 231 (1934) ..... 7.

Lynch v. United States, 292 US 571,
78 L Ed 1434, 54S Ct 840 (1934) ..... 6.

Perry v. United States, 294 US 350-351,
79 L Ed 912, 55 S. Ct 432 (1934) ..... 6.

Sinking Fund Cases 99 US 700,
25 L Ed 496 (1878), ... 6.

St. Louis v. United R. Co., 210 US 266,
52 L Ed 1045, 28 S Ct 630 (1930) ..... 7.

United States v. Larionoff, 431 US 864,
53 L Ed 2d 48, 97 S Ct 2150 ..... 6.

Merrion v. Jacarilla Apache Tribe, 455 US 130,
71 L Ed2d 21, 102 S Ct 894 (1982). ..... 7.

Veix v. Sixth Ward Building and
Loan Assn. of Newark, 310 US 32,
84 L Ed 1061, 60 S Ct 972 (1940) ..... 7.

Alpine Ridge Group v. Kemp, 955 F.2d
1382, (9th Cir.), reversed on other grounds,
123 L Ed2d 572, 113, S Ct 1898 ..... 3.

STATUTES:

743 USC § 485h(e) ..... 3.

Section 106 of Pub. L. No. 96-546..... 2.

ARGUMENT

A. INTRODUCTION.

The United States and Madera agreed that Madera would transfer its dam site and water rights, required for the irrigation of the land within the district, in return for a contractual promise by the United States to furnish a permanent water supply at a price no higher than that charged to others. If a subsequent Congress is allowed to repudiate that right in order to gain revenue, what faith and trust can our people have for promises given by our government?

Are the Fifth Amendment and the cases protecting vested contractual rights now without meaning where those rights are taken by subsequent Congressional Acts?

Is the long line of cases which afford protection under the Fifth Amendment to be ignored or overruled by applying the "surrender in unmistakable terms of the exercise of the sovereign power" test to legislation which abrogates contractual rights for the sole purpose of increasing revenue to the United States?

These are the questions raised in this case; questions which need the decision of this Court to clarify what now constitutes an unanswered conflict between two diametrically opposed lines of prior decisions of this Court.

B. RESPONDENT IGNORES THE CLEAR CONSTITUTIONAL QUESTION PRESENTED.

1. The Constitutional Issue:

Madera has, and the Circuit Court recognized, a

constitutionally protected vested right of renewal of its contract, which by its terms is to be at a price for water delivery no higher than that charged to other Friant Contractors.

Congress, in adopting Public L. No. 96-546[1] attempts to recoup, as a condition to contract renewal, a payment by Madera of $5,200,000 more than the agreed price for delivery made under the 1951 contract which also constitutes a charge of $5,200,000 more than the amount charged to other Friant Contractors for water delivered under the renewed contract.

Respondents and the Circuit Court justify the denial of Madera's rights on the basis that there is no showing of a "surrender in unmistakable terms of the exercise of the sovereign power".

They ignore, however, the whole line of cases cited herein which hold vested rights are protected by the Fifth Amendment from subsequent Congressional action enacted solely for the purpose of raising money.

They further ignore that each case which invoked the "surrender in unmistakable terms" doctrine was a case involving the exercise of the police or taxing power of the sovereign.

Respondents do not address the issue of whether the Contract provisions constitute a surrender in unmistakable terms if that test were applicable.

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[1] See APENDIX D to PETITION: page 1.

C. THE CONFLICT WITH *ALPINE RIDGE GROUP v. KEMP*.

At footnote 2 on page 9 of their Opposition Brief, Respondents assert that *Alpine Ridge* is no longer in conflict with this case as it was reversed on appeal by this Court in *Cisneros v. Alpine Ridge Group*, 123 L Ed2d 572, 113, S Ct 1898 (1993). What Respondents failed to state, however, was that the reversal was on other grounds than the Constitutional issues set forth therein and the Court specifically stated it would not consider the Constitutional issues.

D. THE RIGHT OF THE UNITED STATES TO RECOUP OPERATION AND MAINTENANCE CHARGES.

1. Respondents' Assertions:

Respondents assert[2] that nothing in the contract precludes the government from setting rates which would recoup O&M losses. We agree that recoupment may be made, but not by the method set forth in P.L. 96-546 § 106.

2. The Agreed Price Under the 1951 Contract:

Under the provisions of 43 USC § 485h(e) the Secretary was empowered to exercise discretion:

> ". . . the Secretary, in his discretion may enter into either short term or long term contracts to furnish water for irrigation purposes. Each such contract shall be for such period, not to exceed forty years, and at such rates as in the

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[2] Respondents Brief in Opposition: page 9.

Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance costs and an appropriate share of such fixed charges as the Secretary deems proper, . . ." (Emphasis added)

The Secretary in exercising the discretion vested in him by 9(e) set the rate for the Friant Unit of the Project at no more than $3.50 per acre foot for Class 1 and $1.50 for Class 2 for the 40 year term of the contracts. These rates were set forth in the Contracts. At the time these rates were set they were considered exceedingly high by the districts. The falling groundwater could be pumped for 50¢ per acre foot and the firm supply of surface water was seven times as high. In spite of this discrepancy Madera knew that the surface supply was necessary to the future continued ability to produce irrigated crops and executed the 1951 Contract.

3. § 106 of P.L. 96-546 Is An Attempt By Congress To Increase The Price Paid For Water Under The 1951 Contract.

Congress, in adopting § 106 of P.L. 96-546 attempted to undo what it had authorized the Secretary to do and to require Madera to pay $5,200,000 more for water delivered under the 1951 Contract than the contracted amount. Respondents' and the Circuit Court's attempt to designate this as a charge for water delivered under the renewal contracts is an attempt to obscure what Congress has ordered. The law states:

"The Secretary . . . shall include in each new or amended contract for delivery of water . . . provisions ensuring that any annual deficit (outstanding or hereafter arising) incurred by a Central Valley Project water contractor in the

payment of operation and maintenance costs . . . is repaid by such contractor under the terms of such . . . contract." (Emphasis added)

This is a clear requirement by Congress to extract from the District a repayment of a higher charge for water delivered under the 1951 Contract than the contracted rate which was paid thereunder. What the Act is saying is that while Congress had given the Secretary the discretionary power to set contract rates, that a new Congress 33 years later did not like the rates he set and decided to change the contract rates and require payment thereof as a condition of renewal.

It does not assist Respondents to call the extraction of the $5,200,000 difference between what the United States agreed it would deliver water for under the 1951 Contract and what it now demands be paid under that contract "a charge for water under the new contract". In the first instance, the statute is clearly one which requires repayment of an amount in excess of the agreed charge. Secondly, if it is an additional charge for new water, Madera has a recognized Constitutional right of renewal and the imposition of a required payment of $5,200,000 for water delivered under the old contract as a condition precedent to exercising its Constitutionally recognized renewal right makes that right meaningless.

4. The Contract Provisions:

The 1951 Contract Provided that:

"Under Part A [the water service portion of the contract] and under succeeding contracts, the rates to be charged to the District for water service shall not exceed charges made to others than the District for the same class of water and

service from Friant Dam and Reservoir."

Like its right to renew, these provisions of the Contracts created vested rights in Madera which are to be protected by the Fifth Amendment.

Madera is being charged $5,200,000 more for delivery of water for an O&M deficit under the 1951 Contract than Gravely Ford Water District which had zero O&M deficit.

Respondents and the Circuit Court attempt to explain away this discrepancy by stating that Madera has a better "service" than Gravely Ford.

This statement is simply not true. In the Friant Unit there are two classes of water, Class 1 and Class 2. The same type of service is provided to each contractor such as scheduling and delivery. Gravely Ford receives its water from the Madera Canal as does Madera and uses Madera's distribution system to carry the water to its boundaries. The "service" both receive [and the "service" of every Friant Contractor] are exactly the same, yet Madera is charged $5,200,000 more than Gravely Ford for water delivered under a renewal contract.

E. THE FIFTH AMENDMENT CASES.

1. Vested Contract Rights Are To Be Protected:

In the Petition we cited and quoted from *Lynch v. United States*, 292 US 571, 78 L Ed 1474 (1933), *Perry v. United States, 294 US 350-351, 79 L Ed 912*, 55 S. Ct 432 (1934) to *United States v. Larionoff* 431 US 864, 53 L Ed2d 48, 97 S Ct 2150 (1977) which hold vested rights are protected by the Fifth Amendment from subsequent Congressional action enacted solely for the purpose of

raising money. These cases were cited with approval in *Bowen v. Agencies Opp. To Soc. Sec. Entrapment,* 477 US 41, 91 L Ed2d 45, 106 S Ct 2390 (1986).

F. THE SURRENDER IN UNMISTAKABLE TERMS CASES.

1. In General:

As contrasted to the Fifth Amendment Cases an examination of the cases cited below which apply the retention of the power of the sovereign to abrogate contractual rights by subsequent legislation unless the right is surrendered in unmistakable terms involves statutes which invoke either the police power or the taxing power of the sovereign. None of them relate to abrogation of a contractual right for the sole purpose of saving money for the government.

The most recent case is *Bowen v. Agencies Opp. To Soc. Sec. Entrapoment, supra,* which quotes from *Merrion v. Jacarilla Apache Tribe,* 455 US 130, 71 L Ed2d 21, 102 S Ct 894 (1982). *Merrion* relies on *Veix v. Sixth Ward Building and Loan Assn. of Newark,* 310 US 32, 84 L Ed 1061, 60 S Ct 972 (1940), *Home Building & Loan Assn. v. Blaisdell,* 290 US 398, 78 L Ed 413, 54 S Ct 231 (1934) and *St. Louis v. United R. Co.,* 210 US 266, 52 L Ed 1045, 28 S Ct 630 (1930)

G. HARMONIZING THE TWO APPROACHES.

1. The Need To Preserve Sovereign Rights:

We recognize the need to preserve the rights of the Sovereign to act under its Sovereign Powers such as the Police or Taxing Powers to effect existing contracts. Such results can be easily seen in the Central Valley Project where restrictions of Delta exports under ESA

and NEPA have reduced contract deliveries to some districts by as much as 50%.

2. The Need to Preserve Vested Contractual Rights:

Madera gave up its dam site and water rights which were vital to continued irrigated agricultural production in return for a promise by the United States to provide them with a permanent supply of water through successive contracts at a price no higher than that charged to others. This vested right is of grave importance to the landowners in the District and should not be lightly put aside.

3. The Proper Test:

If Madera's vested rights are impacted by subsequent Congressional action based on one of the Sovereign's inherent powers such as the Police Power or the Taxing Power, then inquiry should be made to see if the Contract "waives in unmistakable terms" the Sovereign Power in question.

If on the other hand, Madera's vested rights are impacted by subsequent Congressional action based on a statute whose only purpose is to increase payments to the United States, and the impact constitutes a derogation of substantial contractual rights, the Fifth Amendment should be applied to protect the vested right. The $5,200,000 payment as a condition of renewal is certainly a derogation of substantial contractual rights.

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H. DOES MADERA'S CONTRACT CONTAIN AN UNMISTAKABLE WAIVER?

1. How The Waiver Is Made:

While it might be considered that the waiver would be made by Congress in the statute authorizing the contract, the cases make it clear that we look to the contract to determine if the waiver is made. (See *St. Louis v. United R. Co. supra,* 52 L Ed at 1058 and *Merrion v. Jacarilla Apache Tribe, supra,* 71 L Ed2d at 36)

2. What Constitutes An Unmistakable Waiver?

We clearly feel that the unmistakable waiver test does not apply to Madera, but if it did, such a waiver is present.

We sincerely doubt that there has ever been, or will never be, a contract executed by the United States which states:

> "The United States hereby surrenders in unmistakable terms its Sovereign Right to abrogate any term of this contract by subsequent Congressional Action."

It would appear, therefore, that the intent of the parties at the time the contract was executed must be examined to see if there has in fact been a surrender.

Madera not only gave up its dam site and water rights in return for a promise of a permanent supply of water from the project, the contract states that but for such assurance, the transfer of those properties would not and could not be made.

Was it the intention of the parties that Congress,

acting under the Police Power, could have terminated Madera's right to receive its water and transferred the water to Los Angeles? We think not. Unless there is some circumstance showing that a unmistakable surrender can in fact be made, the test is worthless. Instead of applying the test, the Court must change the rule to provide that any contract right can be abrogated by subsequent Congressional action.

CONCLUSION

This case is not only of vital importance to Madera, it presents Constitutional issues that need clarifying and resolving for the benefit of all who contract with the government. Can the contractual promise by the United States be relied upon or can the United States nullify at will any contract it makes?

Certiorari should be granted.

Dated: July 8, 1993

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By: _____
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